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CASE NBR: [87107098] CSY TIME QUESTION STATUS: [ ]
SHORT TITLE: [Johnson, Anthony K.]
VERSUS [Alabama] DATE DOCKETED: [050688]

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 1 1988		Application for extension of time to file petition and order granting same until May 5, 1988 (Kennedy, April 5, 1988).
May 6 1988		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jul 5 1988		Brief of respondent Alabama in opposition filed.
Jul 14 1988		DISTRIBUTED. September 26, 1988
Oct 3 1988		The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, I would grant the petition for a writ of certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. _____ 87-7098

IN THE

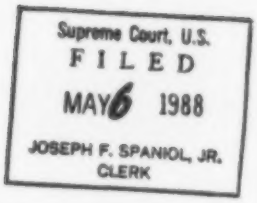
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ANTHONY KEITH JOHNSON, Petitioner,

v.

STATE OF ALABAMA, Respondent.



PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Counsel for the Petitioner:

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QUESTION PRESENTED

WHETHER ALABAMA'S PRESENT CAPITAL SENTENCING SCHEME, AS INTERPRETED AND APPLIED BY THE ALABAMA COURTS, IS UNCONSTITUTIONAL FOR ITS FAILURE IN ANY WAY TO RESTRICT A TRIAL COURT JUDGE FROM IMPOSING A SENTENCE OF DEATH BY OVERRIDING A SENTENCING JURY'S VERDICT AGAINST THE SENTENCE OF DEATH FOR ANY ARBITRARY OR DISCRIMINATORY REASON OR FOR NO REASON AT ALL, FOR ITS FAILURE TO PROVIDE ANY STANDARDS FOR SUCH OVERRIDES, AND FOR ITS FAILURE TO PROVIDE ANY ADEQUATE STANDARD OF APPELLATE REVIEW FOR SUCH OVERRIDES.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ANTHONY KEITH JOHNSON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA

The Petitioner, Anthony Keith Johnson, prays that a writ of certiorari issue to review the judgment of the Alabama

Supreme Court.

OPINIONS BELOW

The decision of the Alabama Supreme Court from which certiorari is sought was filed on February 5, 1988. This unreported decision is attached hereto as Appendix "A". The unreported opinion of the Alabama Court of Criminal Appeals was rendered on November 25, 1986, and is hereto attached as Appendix "B". The sentencing order of the trial Court is set forth in Appendix "C".

JURISDICTION

The final judgment of the Alabama Supreme Court was entered on February 5, 1988. On March 31, 1988, Petitioner filed an Application for Extension of Time for Filing Writ of Certiorari and said Application was granted by this Honorable Court on April 5, 1988. This Court's jurisdiction is invoked

pursuant to 28 U.S.C. section 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments be inflicted.

The Fourteenth Amendment to the United States Constitution provides that:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The relevant provisions of Alabama's capital sentencing scheme are contained in Alabama Code (1975) sections 13A-5-45 through 13A-5-53. A reproduction of these statutory provisions is hereto attached as Appendix "D".

STATEMENT OF THE CASE

The Guilt-Innocence Phase

Petitioner, Anthony Keith Johnson, at the time of the incident in question was a 27 year old, white male, resident of Morgan County, Alabama. He was convicted of capital murder and sentenced by the Court to death by electrocution. In imposing a sentence of death, the Court overrode a nine to three jury recommendation of life without parole, for Petitioner's involvement in a March 11, 1984, attempted Theft of Property from Kenneth Cantrell which resulted in Mr. Cantrell's death.

The evidence adduced at the trial of Anthony Keith Johnson established the following facts:

On the evening of March 11, 1984, a Mr. Kenneth Cantrell and his wife were at their home in Hartselle, Alabama. Mr. Cantrell sold jewelry out of his house. Mrs. Cantrell received a telephone call from a person identifying himself as Bill Spears from Florence, Alabama, and asking to speak to Mr. Cantrell. He made arrangements with Mr.

Cantrell to come to the house to purchase some jewelry later in the evening. Mr. Cantrell became suspicious and had his wife bring him his .38 caliber pistol.

Later in the evening a man between 45 and 50 years of age who identified himself as Bill Spears appeared at the door. Another man outside the house was then motioned forward and he appeared at the door wearing a blue bandanna over his face and brandishing a "real shiny" gun in his hand announcing "[t]his is a hold up".

The man who had appeared initially attempted to hold Mrs. Cantrell; but she successfully evaded his grasp and ran to her husband.

A gun battle ensued which left Mr. Cantrell with six gunshot wounds from the exchange. The last shot was fired by Mr. Cantrell and Mrs. Cantrell believed that he hit one of the intruders. It is not clear how many intruders there were in all (R-347-410).

The record further reveals that on March 12, 1984, the Petitioner went to the home of an acquaintance for assistance in removing a bullet from his back. Petitioner made some statements to this acquaintance which caused the acquaintance to telephone the police and report this meeting and Petitioner's whereabouts (R-411-435). Petitioner was arrested on March 14, 1984, at the motel where he had been taken by the acquaintance.

Mrs. Cantrell was the only witness with respect to the actual incident in question and she was unable to positively identify the Petitioner as one of the intruders. Mr. Cantrell had been armed with a .38 caliber pistol and while a .38 caliber bullet was removed from the Petitioner's back, that bullet and the bullets fired from Mr. Cantrell's revolver could not be positively and conclusively matched (R-660-702). There was quite a bit of expert testimony offered by the State on this issue. (See, e.g., R-660-740). The bullets recovered from Mr. Cantrell's body were .32 caliber

bullets, and no gun known to belong to the Petitioner was of that caliber.

Nevertheless, the jury returned a verdict of guilty of capital murder against the Petitioner. None of the other alleged intruders has ever been identified or arrested.

At sentencing the State submitted two aggravating circumstances to the jury and the Petitioner submitted a number of both statutory and non-statutory mitigating circumstances. The jury, having deliberated for quite a lengthy period of time on the question of guilt or innocence, required only a short period of time to deliberate on the question of sentencing. It returned its sentencing verdict of life without parole by a margin of nine to three.

A sentencing hearing was then held before the Judge. He overrode the jury's recommendation of life without parole and sentenced the Petitioner to death by electrocution. Despite the strong testimony in favor of the existence of mitigating circumstances, the Court rejected the existence of any statutory mitigating circumstances and found that "some other aspects of the case . . . have certain mitigating aspects to them (See Appendix "C" at 24).

There was no transcription made at the trial court of the opening statements of either party or of closing arguments before the sentencing jury and before the Court, despite a motion by Petitioner for a transcription of all such proceedings (R-1107).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD CONSIDER AND FINALLY SETTLE THE QUESTION OF WHETHER ALABAMA'S PRESENT CAPITAL SENTENCING SCHEME, AS INTERPRETED AND APPLIED BY THE ALABAMA COURTS IS UNCONSTITUTIONAL FOR ITS FAILURE IN ANY WAY TO RESTRICT A TRIAL COURT JUDGE FROM IMPOSING A SENTENCE OF DEATH BY OVERRIDING A SENTENCING JURY'S VERDICT AGAINST THE SENTENCE OF DEATH FOR ANY ARBITRARY OR DISCRIMINATORY REASON OR FOR NO REASON AT ALL, FOR ITS FAILURE TO PROVIDE ANY STANDARDS FOR SUCH OVERRIDES, AND FOR ITS FAILURE TO PROVIDE ANY ADEQUATE STANDARD OF APPELLATE REVIEW FOR SUCH OVERRIDES.

In 1981, following this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), the present capital sentencing scheme was enacted in the State of Alabama (See Appendix "D"). The present statutory scheme was Alabama's response to Beck, in which this Court struck down Alabama's initial post-Furman capital statute. The concept and general scheme reflected in the present Alabama statute has been patterned after the Florida statute upheld by this Court in Proffit v. Florida, 482 U.S. 242 (1976). While this Court has most recently approved that Florida statute in Spaziano v. Florida, 468 U.S. 447 (1984), there are significant distinctions between the Alabama statute and the Florida statute which this case and many other pending cases from Alabama illustrate. The relevance of these distinctions for purposes of constitutional analysis will be herein described.

A. The Jury's Role in Sentencing in Alabama Differs from the Role of a Florida Jury in a Capital Case and Carries with it a Great Potential for Juror Misinterpretation.

The central provision of the Alabama capital sentencing scheme at issue in this petition is commonly referred to as the "Jury-override" provision. It is so named beasuse the provision expressly allows a trial Judge to override the jury's sentencing decision, permitting a sentence of death to be imposed by the Court despite the jury's decision in favor of life without parole. The clear practical effect is to render the jury's decision nothing more than a recommendation. This, in itself, in light of Spaziano clearly does not render the statutory scheme constitutionally defective. The constitutional defect arises in Alabama because of the manner in which the Alabama Courts have interpreted and applied the "Jury-override" provision, such manner being far more broad than the interpretation and application of the Florida provision by the courts of that state. By virtue of Alabama's broad application and interpretation, the jury's role in capital sentencing is much different and more confusing than in Florida.

A principal and fundamental difference between the roles of juries in capital sentencing in Florida and Alabama is that the judicial interpretation and application of the Alabama statute has greatly diminished the significance of the jury's role in the sentencing process. A major reason for this result is the complete lack of standards and guidance with respect to the override process. There is a lack of such standards both with respect to when such overrides are appropriate (guidance for the trial court judge) and with respect to appellate review for such overrides. A comparison between the void in this area in Alabama and the rather stringent provision and practice in Florida well illustrates this point.

In Tedder v. State, 322 So.2d 908 (Fla. 1975), the Florida Supreme Court set forth the mandatory process of review for override sentencing decisions that was in place at the time Spaziano was decided by this Court. The standard

set forth in Tedder is to be applied in every case in which a trial judge overrides a jury recommendation of a life sentence and imposes a death sentence. Under the Tedder standard, for a trial court's sentence of death following a jury recommendation of life to be sustained, "[t]he facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 910.

Application of this standard by the Florida Supreme Court has resulted in numerous reductions of death sentences to life sentences (52 through March 1, 1988, according to the records of Professor Michael Radelet, as set forth in Appendix "E") in cases where the death sentences were imposed by judges who overrode jury recommendations of life. See, e.g., Read v. State, 512 So.2d 176 (Fla. 1987); Brookings v. State, 495 So.2d 135 (Fla. 1986); Huddleston v. State, 475 So.2d 204 (Fla. 1985); Rivers v. State, 458 So.2d 762 (Fla. 1984). This stringent standard of review has therefore had a significant impact on the capital sentencing process and has greatly and appropriately enhanced the significance of the jury's role as it relates to the sentence ultimately imposed. It has further served to increase the reliability of the sentencing process. It is clear that there is a strong relationship between the jury's role in arriving at a decision during the guilt-innocence phase and the recommendation made by the jury with respect to sentencing. That relationship is inherent in the two-tiered capital statutory scheme and is greatly diminished where, as in Alabama, there is a failure to provide for this stringent standard of review.

The Alabama Supreme Court has expressly rejected application of the Tedder rule to Alabama death penalty cases. See, e.g., Ex parte Jones, 456 So.2d 380, 381-383 (Ala. 1984), cert. denied, 470 U.S. 1062 (1985). Furthermore, the Alabama Supreme Court has failed to adopt

any standard whatsoever to review judicial overrides of jury life-without-parole recommendations. See Ex parte Harrell, 470 So.2d 1309, 1317 (Ala. 1985). Thus, without any standard for review for jury overrides, the Alabama Supreme Court has left sentencing judges free to reject jury recommendations of life without parole for any reason or for no reason at all. This is the danger which undeniably permits and, in all likelihood, leads to wholly arbitrary and standardless imposition of the death penalty. This, in itself, renders the statute, as applied, unconstitutional. And when one considers that the potential for invidious or discriminatory imposition of the death penalty is unchecked under such a statute, the statutory scheme's inherent constitutional defect becomes all too apparent.

In sharp contrast to the results in Florida where the Tedder rule for jury overrides has resulted in the numerous reductions of sentences as hereinbefore described, in the Alabama, appellate courts have never set aside as improper any of the seventeen trial judge overrides of life-without-parole jury recommendations under the capital punishment statute at issue here. Consequently, the two-part sentencing system in the Alabama post-Furman capital statute is rendered a nullity. This Court, as it noted in Spaziano, supra, at 465, has already recognized the importance of the Tedder standard. See Dobbert v. Florida, 432 U.S. 282, 294-295 (1987) The absence of such a standard in Alabama and cannot withstand constitutional scrutiny.

B. Because the Jury's Role with Respect to Sentencing in Capital Cases in Alabama Has Been Rendered Meaningless, the Effect Has Been that there Exists the Same Constitutional Defect Found by this Court to Exist in Beck v. Alabama--That is, Questionable Reliability of the Jury's Guilt-Innocence Determination.

Reliability in the sentencing process in death penalty cases has been, as it must be, a fundamental concern.

As this Court has stated, relying upon the Eighth Amendment to the United States Constitution, "[t]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 998-999 (1983). The need for insuring that the sentencing process and the relative roles thereunder are exercised in a responsible and reliable manner is greatest in the capital sentencing arena. As this Court noted in Caldwell v. Mississippi, 472 U.S. 320, 329 n.2 (1985), "[m]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion); Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976). See also Barefoot v. Estelle, 463 U.S. 880, 924 (1983) (Blackmun, J., dissenting) (Woodson's concern for assuring heightened reliability in the capital sentencing determination "is as firmly established as any in our Eighth Amendment juris-prudence")

This Court in Beck v. Alabama, supra, considered the former Alabama capital statute's preclusion of the consideration of lesser included offenses at the guilt-innocence phase, where evidence supported such instruction, and concluded that such a preclusion was unconstitutional. Underlying the Court's decision was a determination that such preclusion undermined the reliability of the jury's guilt-innocence determination because the jury was forced to choose between acquittal and a capital murder conviction in instances where the evidence supported alternative lesser verdicts.

The statutory scheme now at issue suffers from a similar constitutional defect. As happened in this case, the

jury deliberated long and hard on the question of guilt or innocence and finally arrived at a verdict of guilty; however, the jury deliberated only a short period of time before arriving at a recommendation of life without parole by an overwhelming vote of nine to three. The Court overrode this clear recommendation by the jury, and such override is subject to no standard of review. As a result, any question that may have remained in a given juror's mind with respect to guilt or innocence which that juror might have attempted to resolve by seeking the less severe punishment at the sentencing phase was virtually wiped out. It must be constitutionally defective for a Court, unguided by any standards to be permitted to override such an overwhelming decision without such override being subjected to scrutiny by a reviewing court.

1. The Unconstitutional Application of the New Alabama Statute in Petitioner's Case.

Alabama's post-Beck capital statutory scheme and Rule 45A of the Alabama Rules of Appellate Procedure provide for an "independent" review of the record by state reviewing ourts. The analysis under these provisions in this case is set forth in the opinion of the Alabama Court of Criminal Appeals (See Appendix "B" at 14-16).

Section 13A-5-53(a) Code of Alabama (1975) requires the state appellate court to review the imposition of the death penalty in a given case by answering three questions:

> (1.) Was any error adversely effecting the rights of the defendant made in the sentence proceedings?
> (2.) Were the trial Court's findings concerning the aggravating and mitigating circumstances supported by the evidence?
> (3.) Was the death penalty the proper sentence in this case?

To answer the third question, whether the death penalty was properly imposed in the case, the Court must determine:

> (1.) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (emphasis added)
> (2.) Whether an independent weighing of the aggravating and mitigating circumstances at the

> appellate level indicate that death was the proper sentence;
> (3.) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

See Appendix "B" at 15, citing Code of Alabama (1975), Section 13A-5-53(b) and Beck v. State, 396 So.2d 645 (Ala. 1980).

The Court of Criminal Appeals in this case found "nothing in the record before us which even intimates that the death penalty was imposed under the influence of passion, prejudice, or any other arbitrary factor." Id. But, an error by the trial court wholly robbed the appellate court of a meaningful opportunity to determine whether its conclusion was accurate.

Despite a pre-trial motion filed by Petitioner for a complete record of all proceedings (R-1107), including specifically "opening statements" and "closing arguements" (sic), the trial Court failed to permit a record to be made of opening statements during the guilt-innocence phase or of closing arguments during the sentencing phase to the jury and to the Court. Arguments to the jury during both guilt-innocence and, more especially, sentencing phases are, perhaps, the most ripe areas for the interjection of appeals to passion, prejudice, and other arbitrary and impermissible factors. Without a record of these key areas of the trial Court proceedings, there is no record for the appellate court to review in carrying out its responsibility to guard against the influence of such factors.

This is especially significant in this case where the trial was held in a rural county with a prosecutor known for his emotional appeals and whose closing argument during the sentencing phase in this case, upon information and belief, consisted of an emotionally wrenching performance replete with biblical references and delivered between sobs with periodic breaks to wipe his teary eyes with a handkerchief.

This Court has repeatedly had to consider constitutionally violative closing arguments in death penalty cases. See e.g. Caldwell v. Mississippi, 472 U.S. 320 (1985). Such improper argument as may well have occurred in this case, but which Petitioner has been precluded from raising because of the trial court's refusal to provide a record, is most especially dangerous in the capital sentencing arena because of the nature of the punishment.

The failure to provide a record with respect to such key areas of the proceeding as are relevant to a consideration of the propriety of sentencing seriously undercuts the minimal provisions that are present in the Alabama statutory scheme for review of sentence and severely diminishes any role the "plain error" rule might have in the review process.

2. Alabama's Unique Capital Sentencing Scheme, Like Its Predecessor, Lends Itself to Unreliable Guilt-Innocence Decisions.

In this case, the jury deliberated for quite a lengthy period with respect to the guilt or innocence decision. In contrast, it deliberated a very short period of time in reaching its nine to three sentencing verdict of life without parole. Although there perhaps should not be a way under our system of law to know what exactly was determinative for each individual juror with respect to his or her decision, where the final step of a judicial override is provided for by statute, it is absolutely essential that there be a standard for review of such an override that is at least as stringent as the procedures in practice in Florida. Otherwise, the reliability of the jury's verdict on the question of guilt or innocence is severely diminished. It is quite possible that the jury in this case, as in many cases, either led there by some unrecorded improper argument, or through its own understanding of the Court's instruction with respect to its role in sentencing, premised its guilty verdict on the mistaken belief that it could "compromise"

such a verdict by sentencing the Petitioner to life without parole rather than to death. If that were the case, then the jury in this case, and in many other cases operating under the Alabama capital sentencing scheme, like juries operating under the defect in Beck might well have reached the wrong verdict, simply by virtue of the statutory scheme's provisions.

In sum, Alabama's capital sentencing scheme provides for and leads to a unique capital sentencing system. The statutory scheme provides for jury input in the sentencing decision; however, that input is very limited. The ultimate sentencing decision is left with the judge and, in instances in which the judge overrides the recommendation of the jury, as was the case here, there is no test for reviewing the propriety of the judge's override decision. This is the principal distinguishing factor between the Alabama system and the Florida system approved by this Court in Spaziano, supra. The Tedder rule was in place in Florida when this Court reviewed Spaziano; and Alabama simply has nothing akin to the Tedder rule, has specifically rejected such a rule, and has in place no procedural or substantive safeguard to prevent the arbitrary or discriminatory imposition of the death penalty by virtue of a jury override.

As has been discussed, a lack of reliability is inherent in the Alabama capital sentencing scheme. That is, inherent in the system is the potential for the jury to mistakenly perceive its role as both determiner of guilt and sentencer. The jury may compromise its guilt-innocence determination in favor of guilt, with the intention of imposing the more lenient sentencing alternative, life without parole.

The Alabama sentencing scheme is simply intellectually dishonest. The jury perceives itself as an important part of the process, so much so that it is

instructed that it must sit through an entire second trial before recommending punishment if it returns a guilty verdict. Though the jury is advised that its sentencing verdict is a recommendation, it is significant that it is not told that its recommendation can be rejected for any reason or for no reason at all. Although the court must set out its findings with respect to aggravating and mitigating circumstances, its specific reason for overriding the jury, and in this case overriding an overwhelming verdict by the jury, is not subject to review. The jury, therefore, labors under the mistaken impression, not just during its penalty phase deliberations, but during the guilt-innocence phase as well, that its sentencing verdict will have a profound effect on the sentence ultimately received by the accused.

There are several methods which could be adopted to bring Alabama's capital sentencing scheme within the parameters of sentencing processes of other states that have been upheld by this Court. The two level system could be eliminated such that the jury is given final sentencing decision authority; the sentencing decision could be made entirely a matter for the Court; or a trial Judge's override of a jury's recommendation, rejecting life without parole in favor of a death sentence, could be subjected to scrutiny under a standard such as Florida's Tedder rule, approved by this Court in Spaziano, supra. Whichever alternative is eventually selected, as a preliminary matter, the present Alabama statutory scheme must be struck down as unconstitutional.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

David Schoen

J. Richard Cohen

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CERTIFICATE OF SERVICE

The undersigned hereby certify that they have served a true and exact copy of the foregoing Petition for Writ of Certiorari on William Little, Assistant Attorney General, 11 South Union Street, Montgomery, Alabama 36130, by placing same in the United States Mail, postage prepaid and properly addressed, on this the 5th day of May, 1988.

David Schoen

J. Richard Cohen

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ANTHONY KEITH JOHNSON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX "A"

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1987-88

Ex parte Anthony Keith Johnson

86-792

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Anthony Keith Johnson
v.
State of Alabama)

PER CURIAM.

Pursuant to Rule 39(c), A.R.App.P., we granted the defendant's petition to review the judgment of the Court of Criminal Appeals affirming his conviction and sentence of death. Johnson v. State, [Ms. 8 Div. 446] ___ So.2d ___ (Ala.Cr.App. 1986). After carefully and thoroughly considering the record of trial, the Court of Criminal Appeals' opinion, and the briefs and arguments of the parties, we find no basis for reversal of the judgment of the Court of Criminal Appeals.

AFFIRMED.

All the Justices concur.

APPENDIX "B"

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1986-87

8 Div. 446

Anthony Keith Johnson

v.

State

Appeal from Morgan Circuit Court

TAYLOR, JUDGE

Appellant, Anthony Keith Johnson, was indicted by the June 1984 term of the Morgan County Grand Jury for the intentional murder of Kenneth Cantrell, during the course of a robbery, in violation of §13A-5-40, Code 1975. The indictment charged specifically that "Anthony Keith Johnson ... did intentionally cause the death of Kenneth Cantrell by shooting him with a pistol" and that he "caused said death during ... the course of attempting to commit a theft of property of Kenneth Cantrell ... by the use of force against the person of Kenneth Cantrell with intent to overcome his physical resistance or physical power of resistance ... ." Appellant was subsequently tried and found guilty as charged in the indictment. A sentencing hearing was held, at which the jury recommended that appellant be sentenced to life imprisonment without parole. The trial court overrode the jury's recommendation and, on November 8, 1985, sentenced appellant to death.

The record reveals that on the evening of March 11, 1984, the victim, Kenneth Cantrell, and his wife, Nell Cantrell, were at their home in Hartselle, Alabama. The Cantrells had been in the jewelry business for 24 years and at this time were conducting the business from their home.

Mrs. Cantrell received a phone call from a person identifying himself as Bill Spears from Florence, Alabama, and he asked to speak to Mr. Cantrell. He told Mr. Cantrell that he would like to purchase some jewelry from him, and they arranged a meeting a short time thereafter at the Cantrell home. Mr. Cantrell was apparently suspicious of the caller, because he asked his wife to hide his wallet and bring him his .38 caliber pistol.

When Mrs. Cantrell heard a knock at the door, which led from their carport into the combined living room and dining room area of their home, she went to answer it. She observed that the man already had the storm door open, but she had to open the door to hear what he had to say. When she opened the door she encountered a man between 45 and 50 years of age who identified himself as Bill Spears. She noticed that he held one hand behind his back and she asked

if he was concealing something. He said that he was not and showed her his hand.

At the same time he motioned for another man who had been hiding in the carport to come forward. At this, the man already at the door grabbed Mrs. Cantrell, and the other man, wearing a blue bandana over his face and brandishing a "real shiney" gun in his hand, announced "This is a holdup."

Mrs. Cantrell, attempting to warn her husband, was able to break free from the first man who was holding her, run to her husband and fall at his feet. As she lay at her husband's feet she heard one of the men say, "Come on in, Bubba, I have got him," whereupon Mr. Cantrell said, "Freeze.... No we have got you" and one of the men said, "No, we have got you." During this verbal exchange one of the men fired at Mr. Cantrell; he returned fire and a short gun battle ensued. Mrs. Cantrell lay motionless at her husband's feet while this exchange occurred, only raising her head up enough to notice that one man had on brown boots. After a number of shots were exchanged, there was a silence, and then Mr. Cantrell fired one last shot. When this shot was fired she heard one of the intruders say, "Oh", and then she heard the sound of shuffling feet, as if one of the intruders was assisting the other in getting out the door.

Mrs. Cantrell waited a moment after the intruders left, looked up at her husband, noticed that he had blood all over him and that she had blood all over her but that she was not shot. She then called an ambulance and police to the scene.

Mr. Cantrell sustained six gunshot wounds in the exchange, three in the right side of his chest, one in the left side of his chest, one on the back of his right arm, and one to his right middle finger. The bullets which

struck him in the chest passed through his lungs and the large arteries from the heart, causing rapid death.

On the evening of March 12, 1984, the day after the murder, appellant went to the home of David Lindsey, who was a friend, in Newell, Alabama. Appellant told Lindsey that he had been shot. When Lindsey inquired as to what had happened, appellant stated, "Well you know how it is when you have got the habit." Appellant told Lindsey that he knew he had been to Vietnam and asked if he knew a medic or someone who could get the bullet out. Lindsey told him that he knew no one who could do that.

At appellant's request, Lindsey, on the morning of March 13, 1984, drove him to a motel in Oxford to meet Gene Loyd. Lindsey testified that Loyd and appellant were glad to see each other, and Loyd asked appellant where he had been. Appellant replied that he "had to get the hell out of Hartselle." He said that he and some friends had gone into a place to get some gold and that he had been shot. According to Lindsey, appellant stated, "I got shot, but I got off a couple of rounds, and I believe I got that son of a bitch." Lindsey returned home, where he heard that a murder had occurred in Hartselle, and he contacted authorities.

Appellant was arrested on March 14, 1984, at the motel where he had been taken by Lindsey. A pair of brown boots, which appellant claimed to own, were found at the scene of the arrest. A bullet wound was discovered in his back; that wound was 50.5 inches from the ground when appellant was standing. A search warrant was obtained, and the bullet was removed from his back.

It was discovered that Mr. Cantrell had fired his R.G. brand revolver six times at the intruders. Most of the shots were in an upward direction from the point where he

was sitting on his couch. The revolver was loaded with .38 special C.C.I. Blazer cartridges manufactured by Omark Industries. Four C.C.I. Blazer bullets were recovered from objects which they had struck at the scene. One bullet apparently passed through the ceiling and could not be found. One bullet passed through a pane of glass on the back door 46.375 inches from the ground. A search of cardboard boxes and the wall in this bullet's path failed to reveal the bullet. The four C.C.I. Blazer bullets found at the scene had the same number of lands and grooves as the bullets test fired from Mr. Cantrell's R.G. revolver, but it was impossible to definitely make a determination that Mr. Cantrell's revolver actually fired the bullets.

The bullet which was removed from appellant's back was a .38 special C.C.I. Blazer. The bullet had the same number of lands and grooves as those test fired from Mr. Cantrell's R.G. revolver and those found at the scene, but again, it was impossible to make a definite determination that Mr. Cantrell's revolver actually fired the bullet.

The bullet which was removed from appellant's back had glass imbedded in its nose. Test comparisons of the glass removed from the bullet and that found in the pane on the back door, through which the unaccounted-for bullet had passed, revealed that all of their physical properties matched, with no measurable discrepancies. Based upon F.B.I. statistical information, it was determined that only 3.8 out of 100 samples could have the same physical properties, based upon the refractive index test alone, which was performed.

I

Appellant contends that the trial court erred in permitting the State to challenge juror Carrell for cause over appellant's objection. Appellant argues that juror

Carrell was not unalterably opposed to the death penalty and that she was able to follow the trial court's instruction as to the law. He contends that when the trial court permitted the challenge for cause of juror Carrell it effectively denied appellant a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution.

The most pertinent questions posed to juror Carrell on this issue by District Attorney, Mike Moebes, defense attorney, Thomas Digiulian, and the trial court and the corresponding answers given by juror Carrell were as follows:

> "MR. MOEBES: Well, let's say if you heard all of the evidence and the testimony and the witnesses and the Judge's charge on the law and your oath, if the evidence in this case proved to you beyond a reasonable doubt and to a moral certainty that the Defendant was guilty as charged, would you return a verdict of guilty?
>
> "JUROR CARRELL: Well, I guess you would almost have to.
>
> "MR. MOEBES: Well, if one of the punishments in this case for such an offense is that of death by electrocution --
>
> "JUROR CARRELL: No, I couldn't do that.
>
> "MR. MOEBES: You could not do it?
>
> "JUROR CARRELL: No, I couldn't do that.
>
> "MR. MOEBES: Under no circumstances would you consider the punishment of death by electrocution?
>
> "JUROR CARRELL: No, sir. I couldn't do that.
>
> "MR. MOEBES: Anyone else?
>
> (NO RESPONSE)
>
> "MR. MOEBES: Then I take it, Mrs. Carrell, that what you have said is that you would not be willing to consider the death penalty as provided by law in this case, is that what you are saying?
>
> "JUROR CARRELL: Electrocution. I mean I just -- I just cannot -- I don't feel like it is my place to put somebody

else's life in my hands. I mean I just -- my belief is we are not -- we are just -- we are not suppose to take another human being's life in our hands.

"MR. MOEBES: Mrs. Carrell, I am not asking you to defend your position. I just want to know what your position is now. Be truthful with me and the Court and the lawyers over there.

"JUROR CARRELL: I couldn't do it.

"MR. MOEBES: That is what we want to know, is how you feel about the death penalty.

"JUROR CARRELL: I couldn't do it.

"....

"MR. MOEBES: Then I take it, Mrs. Carrell, that you feel that you would never under any circumstances vote as a juror for a death penalty?

"JUROR CARRELL: No, I wouldn't.

"MR. MOEBES: I take it that you would refuse to apply the death penalty no matter how strong the evidence and under all circumstances in any case?

"JUROR CARRELL: That is right. I just don't believe I could do it.

"....

"MR. DIGIULIAN: ... Now, I believe you testified in response to Mr. Moebes that you didn't think there would be any circumstances under which you could require someone to be put to death for the commission of a crime, is that correct?

"JUROR CARRELL: That is right.

"MR. DIGIULIAN: Now, is that based on your religious beliefs?

"JUROR CARRELL: I feel like there should be punishment, but I just don't feel like I could say by death, you know.

"MR. DIGIULIAN: Now, is that in this case alone or any?

"JUROR CARRELL: I just don't think -- I wouldn't want to have it on my neck -- on my heart and my hands that I did that to somebody.

"....

"MR. DIGIULIAN: ... As jurors you would be called on to do your civic duty in this case if you are chosen to hear the evidence and render a verdict in accordance with your oath and instructions from the Court and the evidence that you hear. Now if you were chosen as a juror in this case, would you be able as your civic duty to listen to the evidence and follow your oath as a juror, which would require you to consider the imposition of the death penalty in this case?

"JUROR CARRELL: You know, that is hard to answer. I am real nervous, too. I mean I have stated my feelings, you know, and I just don't know. I mean I would have to follow the oath. I know that. We need to -- we have got to have laws, but still in my own heart I just can't find where I could say death by electrocution or, you know, just death, you know. It would really bother me.

"MR. DIGIULIAN: But then that is a serious thing to have to do, isn't it?

"JUROR CARRELL: That is right.

"MR. DIGIULIAN: It should bother everybody, shouldn't it?

"JUROR CARRELL: That is right.

"MR. DIGIULIAN: But you would follow your oath, would you not?

"JUROR CARRELL: Yes, I would follow it.

"MR. DIGIULIAN: Following your oath and consider the death penalty in this case -- you would follow your oath, would you not? Don't make me put words in your mouth. Answer from your heart.

"JUROR CARRELL: I guess that -- now explain a little bit about following the oath. To me that means -- see, lots of this is new to me. This is my first experience as a juror or to be in a courtroom or anything, and I am very nervous. I want to do the right thing, and I know there are others involved and that the other family is involved, too, in this, but still --

"MR. DIGIULIAN: Ma'am, you --

"JUROR CARRELL: I don't know. I -- could I just say it would be hard for me to say until I am in that situation --really there in that area. When it is like this situation is with me, and as many people as we have to pick from with people feeling in their hearts

like I do, why would we even have to do that. Why were we put in a position to make this choice.

"....

"MR. DIGIULIAN: .. In your oath as a juror it provides that you will well and truly try all issues which may be submitted to you and true verdicts render according to the evidence. That is your oath. I am not trying to put you on the spot. I want to know what you think.

"JUROR CARRELL: I would have to really -- I mean my feelings would -- I would have to follow my oath. I would have to do what I felt right, you know.

"....

"MR. DIGIULIAN: In the event that you were called to be a juror in the trial of the murder of a child, and that is not the case here, but maybe it is a brutal murder and the child was maybe tortured, would you then consider the death penalty under those kind of circumstances?

"JUROR CARRELL: Well, can I answer like this? I know there has to be punishment, but there again it would be hard for me to say yes, death, you know. I just feel like we are not -- I don't have that person's life in my hands to judge, and I know now being a juror we are to judge, but I guess that is the reason I said -- I am a strong believer in my religion, you know, and I know that we are not supposed to take lives.

"MR. DIGIULIAN: But you would follow your oath as a juror?

"JUROR CARRELL: I would have to follow my oath.

"MR. DIGIULIAN: And you would discharge your duty even though it would be hard.

"JUROR CARRELL: It would be hard, but—I would have to follow my oath.

"....

"MR. MOEBES: If you were chosen as a juror in the trial of this case, would your views on capital punishment prevent or substantially impair the performance of your duties as a juror in accordance with your instructions and oath? That is either prevent or substantially impair.

"JUROR CARRELL: It would probably prevent.

"MR. MOEBES: In your opinion it would prevent it?

"JUROR CARRELL: Uh - huh.

"....

"THE COURT: Mrs. Carrell, can you think of any case that you would impose the death penalty in? Just answer me, can you or can't you?

"JUROR CARRELL: No.

"THE COURT: Is your belief based on your religious convictions that you shouldn't kill another human being under any circumstances?

"JUROR CARRELL: That is right. It is based on that."

In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Supreme Court reaffirmed and again set forth the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. The standard, as stated by the Court, is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." The Court went on to note that the juror's bias need not be proved with "unmistakable clarity," and in discussing its reasoning stated:

> "This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made unmistakably clear; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons

> that will be more fully developed infra, this is why deference must be paid to the trial judge who sees and hears the juror."

Wainwright v. Witt, supra, 4 9 U.S. at ____, 105, S.Ct. at 852-53.

From the record, as set forth above, it is apparent that juror Carrell vacillated in her answers regarding her ability to fulfill her oath. Her final response on the issue, when asked whether her views would either prevent or substantially impair the performance of her duties in accordance with the trial court's instructions and her oath, was that "It would probably prevent." In view of this statement and the cumulative effect of her other reponses, we find that juror Carrell sufficiently indicated that her bias towards the death penalty would indeed prevent the performance of her duties as a juror in this case. Accordingly, we find that the trial court committed no error in permitting the State to challenge juror Carrell for cause.

II

The appellant contends that the trial court erred when it refused to instruct the jury that they could not consider the theft (by the use of force) allegation in the capital murder indictment as an aggravating circumstance in the penalty phase of the trial. The appellant cites Keller v. State, 380 So.2d 926 (Ala.Cr.App 1979), cert. denied, 380 So.2d 938 (Ala. 1980), and Bufford v. State, 382 So.2d 1162 (Ala.Cr.App.) cert. denied, 382 So.2d 1175 (Ala. 1980), in support of this argument. The trial court, in refusing this charge, correctly noted that this line of cases was overruled by Kyser v. State, 399 So.2d 330 (Ala. 1981). See also Dobard v. State, 435 So.2d 1338 (Ala.Cr.App. 1982), affirmed, 435 So.2d 1351 (Ala. 1983), cert. denied, 464 U.S. 1063, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984).

Furthermore, §13A-5-50, Code of Alabama 1975, entitled Consideration of Aggravating Circumstances in Sentence Determination, provides as follows:

> "The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5 49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40."

Pursuant to this code provision and the decisions in Kyzer, supra, and Dobard, supra, we can find no basis for the appellant's contention that this charge should have been given. Accordingly, we find that the trial court committed no error in refusing the requested charge.

II

Appellant contends that the trial court erred in refusing his motions for judgment of acquittal on the grounds that there was no proof that he was in Morgan County, where the murder was committed, and no proof that the gun which he possessed at the time he was arrested was used in the shooting.

Contrary to appellant's contention that there was no proof he was in Morgan County when the murder was committed, we find that considerable evidence was presented on this issue. According to the testimony of David Lindsey, appellant, by his own admission stated that he had been in Hartselle, that he was involved in a robbery, that he had been shot, and that he believed he had a shot the man who shot him. There was also considerable additional

circumstantial evidence, as already set forth above, which placed appellant at the scene of the crime.

We note that the jury was fully informed that a pistol which was found in appellant's possession when he was arrested was not the murder weapon and that they apparently accorded this fact little weight. The jury apparently did not find it unusual that the appellant no longer had the murder weapon in his possession when he was arrested some three days after the murder was committed.

In Cumbo v. State, 368 So.2d 871 (Ala.Cr.App. 1978), cert. denied, 368 So.2d 877 (Ala. 1979), this court stated:

> "In reviewing a conviction based on circumstantial evidence, this court must view that evidence in the light most favorable to the prosecution. The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude." (Citations omitted.)

See also Daniels v. State, [Ms. 1 Div. 92, Nov. 16, 1985] _____ So.2d _____. (Ala.Cr.App. 1985).

Viewing the State's evidence by this principle we find that the evidence was more than sufficient to allow the jury to reasonably conclude that the evidence excluded every reasonable hypothesis except that of guilt. Accordingly, we find that the trial court did not err in denying appellant's motion for judgment of acquittal.

IV

Appellant, finally, contends that the trial court erred when it refused to strike information from a pre-sentence report indicating that marijuana was found at the scene where the defendant was arrested. When appellant requested that this information be stricken from the report, the trial court replied, "I won't strike it, but I won't consider it as being [an] aggravating circumstance." The sentencing

order reveals that the trial court, in fact, did not consider this information in pronouncing sentence upon the appellant.

In a most relevant portion of Thompson v. State, [Ms. 6 Div. 799, April 8, 1986] _____ So.2d _____ (Ala.Cr.App. 1986), this Court found as follows:

> "The appellant contends that the inclusion in the pre-sentence report's criminal history section of charges that had not resulted in convictions was reversible error. However, Rule 3 (b)(2), Alabama Temporary Rules of Criminal Procedure, specifies that the pre-sentence report may contain the 'defendant's prior criminal and juvenile record, if any.' It is clear that the inclusion of charges that did not result in convictions is proper because the Rule allows for juvenile charges to be included. It is well settled that juvenile charges, even those that result in an adjudication of guilt, are not convictions and may not be used to enhance punishment. See Baldwin v. State, 456 So.2d 117, 125 (Ala.Crim.App. 1983), aff'd, 456 So.2d 129 (Ala. 1984), aff'd, _____ U.S. _____, 105 S.Ct. 2727, _____ L.Ed.2d _____ (1985). The inclusion of the charges in no way prejudiced the appellant. The trial judge did consider some of the charges listed, but only those which had resulted in convictions."

From the above, it is apparent that the mere presence of information in the pre-sentence report which should not be considered for the purpose of enhancing punishment is not, per se, prejudicial. In sentencing the appellant, the trial court in the instant case did not consider the portion of the report which indicated that marijuana was found at the scene. Consequently, we find that although this information was not stricken from the report as requested, it in no way prejudiced the appellant.

V

As required by §13A-5-53(a), Code of Alabama 1975, this court reviews the propriety of the imposition of the death

penalty in this case. Our review must include a determination of the following questions:

> (1) Was any error adversely affecting the rights of the defendant made in the sentence proceedings?
>
> (2) Were the trial court's findings concerning the aggravating and mitigating circumstances supported by the evidence?
>
> (3) Was the death penalty the proper sentence in this case?

As to the first question, we have reviewed the sentence proceedings and have found no error adversely affecting the defendant's rights. As to the second question, we have reviewed the record and are satisfied that the trial court's written findings concerning the aggravating and mitigating circumstances are fully supported by the evidence.

To answer the third question, whether the death penalty was properly imposed in this case, we must determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> "(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
>
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Code of Alabama 1975, §13A-5-53(b); see also Beck v. State, 396 So.2d 645 (Ala. 1980).

There is nothing in the record before us which even intimates that the death penalty was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Our independent weighing of the aggravating and mitigating circumstances leaves us with no doubt that the death penalty was appropriate in this case. We find that

there were two statutory aggravating circumstances in this case, as provided by §13A-5-49(1) and (4), Code of Alabama 1975. Those were that appellant committed the offense while he was under a sentence of imprisonment and that the capital offense was committed during the course of a robbery. We further find that there were no statutory mitigating circumstances, as provided by §13A-5-51, Code of Alabama 1975. Finding none of the nonstatutory mitigating circumstances raised by appellant to have merit, we determine that the aggravating circumstances clearly outweigh the mitigating circumstances and that the death penalty was appropriate in this case.

In regard to the final determination this court must make, we find that the death penalty imposed on the defendant is not excessive or disproportionate to the penalty imposed in similar cases. See, e.g., Hamilton v. State, [Ms. 8 Div. 421, September 9, 1986] ____ So.2d ____ (Ala. Cr. App. 1986); Thomas v. State, 460 So.2d 207 (Ala.Cr.App. 1983), affirmed 460 So.2d 216 (Ala. 1984); Singleton v. State, 465 So.2d 432 (Ala.Cr.App. 1983), affirmed, 465 So.2d 443 (Ala. 1985); Bush v. State, 431 So.2d 555 (Ala.Cr.App. 1982) affirmed, 431 So.2d 563 (Ala.), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983); Jacobs v. State, 361 So.2d 607 (Ala.Cr.App. 1977), affirmed, 361 So.2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S.Ct. 1034, 59 L.Ed.2d 83 (1979).

As required by Rule 45A, A.R.A.P., we have searched the record for any plain error or defect in the proceedings below, which may or may not have been brought to the attention of the trial court, which might adversely affect the substantial rights of the appellant. In doing so we discover that the appellant objected to the introduction of the bullet which was removed from his back.

The bullet was removed from appellant's back pursuant to a search warrant issued by the Circuit Court of Morgan County. Appellant, after the warrant was issued, petitioned this court for a writ of prohibition, which we denied in Ex parte Johnson, 452 So.2d 888 (Ala.Cr.App. 1984). While the appellant did not raise it on appeal, we believe that we should address any effect of Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), upon our decision to allow the surgical removal of the bullet, as the direct consequence of that decision was the introduction of the bullet at trial.

In Winston, a shopkeeper was wounded during an attempted robbery, but, being armed himself, was apparently able to wound his assailant in the left side before he fled. Lee was found eight blocks from the scene suffering from a gunshot wound to his left chest.

The Commonwealth of Virginia moved in state court for an order directing Lee to undergo surgery to remove the bullet, asserting that the bullet would provide evidence of Lee's guilt or innocence. As a result of expert testimony, which indicated that the surgery would require an incision of only 1/2 inch, and would be performed under local anesthesia without incurring the dangers of general anesthesia, the trial court granted the motion to compel Lee to undergo surgery. The Virginia Supreme Court, thereafter, denied Lee's petition for a writ of prohibition. Lee then attempted to have the operation enjoined by bringing an action, based on Fourth Amendment grounds, in the United States District Court for the Eastern District of Virginia. That court refused to issue an injunction.

Just prior to surgery, however, X-rays revealed that the bullet was, in fact, substantially deeper in Lee's chest than earlier believed, and the surgeon determined that

general anesthesia would be needed. Lee moved for a rehearing, which was denied by the trial court, and that denial was affirmed by the Virginia Supreme Court. He then returned to the federal district court, which, after an evidentiary hearing, enjoined the surgery. The Court of Appeals for the Fourth Circuit affirmed, and the United States Supreme Court granted certiorari to consider whether a State could compel a suspect to undergo this type of surgery in a search for evidence of a crime.

The Supreme Court stated that "[t]he reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." The Supreme Court in discussing the risks associated with the surgical procedure noted that one surgeon had testified that due to the difficulty of discovering the exact location of the bullet, extensive probing and retracting of the muscle tissue could be required, which could lead to injury of the muscle, blood vessels, and nerves. The Court also noted medical testimony which indicated that the greater intrusion into the chest cavity and the larger incisions required would increase the risk of infection. The Court also addressed the fact that Lee would be required to undergo general anesthesia and found that "[t]his kind of surgery involves the total divestment of respondent's ordinary control over surgical probing beneath his skin."

In examining the other part of the balance, society's interest in conducting the procedure, the Court found that arguments of a compelling need for the bullet were not persuasive. The Court noted that the Commonwealth had available to it substantial additional evidence--that Lee was the individual who accosted the shopkeeper on the night of

the robbery. The Court went on to affirm the decision of the district court prohibitin the surgical removal of the bullet.

We believe that the instant case can be distinguished from Winston. Here, there was competent medical testimony which established that the bullet was lodged in fatty tissue, just beneath the skin in the area of the shoulder blade; that surgery would be minor and would be performed with local anesthetic; and that practically no danger to life or health would be presented by the surgery. Due to the almost non-existent risk of danger to appellant as a result of the surgery and the potential value of the bullet to the State's case, we find that the appellant's interest in privacy and security did not outweigh society's interest in conducting the procedure. Therefore, we reaffirm our decision in Ex parte Johnson, supra, which permitted the surgical removal of the bullet, and we find that the bullet was properly introduced into evidence at trial.

A further review of the record pursuant to Rule 45A, A.R.A.P., reveals no other issue which might adversely affect the rights of the defendant. We, therefore, find that the judgment of the trial court is due to be affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

APPENDIX "C"

A D D E N D U M

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

STATE OF ALABAMA,)
PLAINTIFF)
VS.) CASE NO. CC84-0331
ANTHONY KEITH JOHNSON,)
DEFENDANT)

DETERMINATION OF SENTENCE BY COURT
13A-5-47, CODE OF ALABAMA 1975

The sentencing hearing in this case has been conducted, the jury has returned an advisory verdict and the Court now proceeds to determine the sentence.

The Court has previously ordered a pre-sentence investigation report which has been filed containing the information prescribed by law for felony cases. The Court requested no specific additional information. None of the report was kept confidential and a hearing has been held in open court to afford both sides an opportunity to respond to the pre-sentence report and present any evidence about any portion of it that might be subject to factual dispute. This hearing has been recorded by the Reporter.

At the conclusion of the hearing the Court afforded each side an opportunity to present arguments concerning the existence of aggravating and mitigating circumstances. The order of the argument was the same as at the trial of a case.

The Court now proceeds to enter specific written findings concerning the existence or non-existence of each aggravating circumstance enumerated in Section 13A-5-49, Code of Alabama 1975.

Aggravating Circumstances

The Court finds beyond a reasonable doubt the aggravating circumstance defined in 13A-5-49(1) EXISTS in this case in that the capital offense was committed by a person under sentence of imprisonment.

2. The aggravating circumstance defined in Section 13A-5-49(2) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

3. The aggravating circumstance defined in Section 13A-5-49(3) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

4. The Court finds beyond a reasonable doubt that the aggravating circumstance defined in Section 13A-5-49(4) EXISTS in this case by reason that the capital offense was committed while the defendant was engaged in the commission of a robbery.

5. The aggravating circumstance defined in Section 13A-5-49(5) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

6 The aggravating circumstance defined in Section 13A-5-49(6) DOES NOT EXIST and no evidence in support such an aggravating circumstance was offered.

7. The aggravating circumstance defined in Section 13A-5-49(7) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

8. The aggravating circumstance defined in Section 13A-5-49(8) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

Mitigating Circumstances - Generally

1. The Court finds that the mitigating circumstance defined in 13A-5-51 DOES NOT EXIST in that the defendant does have a significant history of prior criminal activity.

2. The mitigating circumstance defined in 13A-5-51(2) DOES NOT EXIST in that the capital offense was not committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. The mitigating circumstance defined in 13A-5-51(3) DOES NOT EXIST in that the victim was not a participant in the defendant's conduct and did not consent to it.

4. The mitigating circumstance defined in 13A-5-51(4) DOES NOT EXIST. The defendant was an accomplice in the capital offense committed, but the evidence does not clearly demonstrate that it was "committed by another person." Whether the defendant actually fired a fatal shot or not, his participation cannot be considered relatively minor. His participation was substantial and critical.

5. The mitigating circumstance defined in 13A-5-51(5) DOES NOT EXIST in that the record does not reflect that the defendant was under extreme duress or under the substantial domination of another person.

6. The mitigating circumstance defined in 13A-5-51(6) DOES NOT EXIST in that there is no substantial evidence before the Court that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Defendant argues that he had a dope habit, but there is no evidence that he was under the influence of any drug which impaired his responsibility at the time of the murder. The evidence reflects that his actions before, during and after the crime were calculated and completely subject to his control.

7. The mitigating circumstance defined in 13A-5-51(7) DOES NOT EXIST in that the age of the defendant at the time the crime was committed was 27 years.

The Court has addressed all of the statutory mitigating circumstances although the defendant only argued those enumerated in (1), (4), (6) and (7) of Section 13A-5-51, Code of Alabama 1975.

Consideration of Defendant's Character Record
Section 13A-5-52, Code of Alabama 1975

In addition to the mitigating circumstances specified in Section 13A-5-51, the Court has considered all aspects of defendant's character of record and the circumstances of the

offense which the defendant has offered as a basis for a sentence of life imprisonment without parole instead of death. The Court further invited the defendant to direct the Court's attention to any other relevant mitigating circumstances from any source. The Court finds that there are some statements in the pre-sentence report and some other aspects of the case that have certain mitigating aspects to them. These were considered.

Consideration of the Jury's Verdict

The Court has independently weighed the jury's verdict, which was for life imprisonment without parole, and considers it an aspect of mitigation, separate and apart and in addition to the mitigating circumstances provided by Section 13A-5-51, Section 13A-5-52.

Weighing of Aggravating and Mitigating Circumstances
Section 13A-5-48, Code of Alabama 1975

The Court now proceeds to weigh the aggravating and mitigating circumstances to determine the appropriate sentence under the law. The Court has not merely tallied for the purpose of numerical comparison the aggravating and mitigating circumstances, but has marshaled and considered in organized fashion, for the purpose of determining the proper sentence, all of the circumstances in this case whether aggravating or mitigating, including all relevant mitigating circumstances whether enumerated in the criminal code or not, including the jury's recommendation.

The Court finds the aggravating circumstances are substantial and controlling. The mitigating circumstances (other than the jury's recommendation) can be found only by a strained search and are deemed insubstantial by the Court in the face of the evidence which demonstrates a vicious killing of a man in what should have been the quiet repose and safety of his own home.

The Court sentences the defendant, after allocution, to death by electrocution on a date to be fixed by the Supreme Court of this State after disposition of the automatic appeals provided for by law. The Sheriff shall immediately transfer the defendant to the custody of the Director of Corrections and Institutions who shall execute the following judgment of the Court:

JUDGMENT

On this date the defendant was brought before the Court for the purpose of imposing sentence. He was accompanied by his attorneys of record. As reflected by the previous orders and judgments of this Court, the defendant has been tried by a jury and found guilty of the capital offense charged in the indictment. He has been afforded a sentencing hearing at which the jury recommended the punishment at life imprisonment without parole by a vote of 9 to 3. Defendant has been afforded all other hearings provided by law, including the challenge of the pre-sentence report, and other hearings as are evidenced by written findings of fact of record in this case.

The defendant, Anthony Keith Johnson, being asked by the Court if he had anything to say why the judgment of the Court and sentence of the law should not be pronounced against him replied, NOTHING.

It is now considered by the Court and it is its judgment, after weighing of all of the aggravating and mitigating circumstances, including the verdict of the jury that the defendant is guilty as charged in the indictment of the offense of capital murder and the Court hereby fixes his punishment at death by electrocution.

It is, therefore,

ORDERED AND ADJUDGED that the Sheriff of Morgan County, Alabama immediately deliver the defendant, Anthony Keith Johnson, into the custody of the Director of the Department of Corrections and Institutions, there to be safely kept by said Director until a date is fixed by the Supreme Court of the State of Alabama for the execution of this judgment after an exhaustion of defendant's appeals.

On that date and at such time fixed by the Supreme Court of this State, the designated executioner shall, at the proper place for the execution of one sentenced to suffer death by electrocution, cause a current of electricity of sufficient intensity to cause death to pass through the body of the said Anthony Keith Johnson until he is dead.

The Court Reporter shall immediately prepare a transcript of all of the evidentiary proceedings held in this case and the Clerk

shall prepare the record proper. The appellate process shall commence this date.

This the 8th day of November, 1985.

R. E. Hindley, Circuit Judge

§ 13A-5-44

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APPENDIX "D"

(c) Notwithstanding any other provision of law, the defendant with the consent of the state and with the approval of the court may waive the participation of a jury in the sentence hearing provided in section 13A-5-46. Provided, however, before any such waiver is valid, it must affirmatively appear in the record that the defendant himself has freely waived his right to the participation of a jury in the sentence proceeding, after having been expressly informed of such right. (Acts 1981, No. 81-178, § 6.)

Collateral references. — 50 C.J.S., Juries, § 86.
47 Am. Jur. 2d, Jury, §§ 7, 12, 72, 159.

§ 13A-5-45. Sentence hearing — Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in section 13A-5-47(b). Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.

(b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.

(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.

(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama.

(e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances.

Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.

(f) Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

(g) The defendant shall be allowed to offer any mitigating circumstance defined in sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. (Acts 1981, No. 81-178, § 7.)

I. General Consideration.
II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

The sentencing process must comply with the requirements of the due process clause of the fourteenth amendment. Kyzer v. State, 399 So. 2d 317 (Ala. Crim. App. 1979), rev'd on other grounds, 399 So. 2d 330 (Ala. 1981).

But the trial court need not be concerned with whether certain evidence would be admissible under the exclusionary rules of evidence. If the evidence has probative valu it may be received, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. Johnson v. State, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

The trial court is not obligated to do more than provide a fair opportunity for rebuttal. Where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. Johnson v. State, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

Cited in Morrison v. State, 398 So. 2d 730 (Ala. Crim. App. 1979); Julius v. State, 407 So. 2d 141 (Ala. Crim. App. 1980); Watkins v. State, 409 So. 2d 901 (Ala. Crim. App. 1981).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1573-1576.

21 Am. Jur. 2d, Criminal Law, § 527.

Right of court to hear evidence for purpose of determining sentence to be imposed. 77 ALR 1211.

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-32 are included in the annotations for this section.

Sentencing process must conform with due process. — The sentencing hearing must not be a constitutional facade; though the burden of establishing mitigating circumstances must realistically rest with the defendant, this does not relieve the trial court from the requirement of due process in the sentencing hearing. Richardson v. State, 376 So. 2d 206 (Ala. Crim. App. 1978), aff'd, 376 So. 2d 228 (Ala. 1979).

And exclusionary rules of evidence do not apply. — The sentencing hearing is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Richardson v. State, 376 So. 2d 206 (Ala. Crim. App. 1978), aff'd, 376 So. 2d 228 (Ala. 1979).

Alabama's sentencing scheme in death cases broadly allows the accused to present evidence of mitigating circumstances. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979), overruled on other grounds, Beck v. State, 396 So. 2d 645 (Ala. 1980).

Alabama's sentencing process in death cases permits consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979), overruled on other grounds, Beck v. State, 396 So. 2d 645 (Ala. 1980).

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Court not restricted to statutory mitigating factors. — The sentencing court considered evidence as to any matter that the court deemed relevant to sentence, and was not restricted to those mitigating factors statutorily defined. Kyzer v. State, 399 So. 2d 317 (Ala. Crim. App. 1979), rev'd on other grounds, 399 So. 2d 330 (Ala. 1981).

But the only aggravating circumstances which may be considered under the capital felony statute relating to a defendant's prior criminal history are set out in the statute. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Remand for new hearing where improper aggravating circumstances found. — Where trial court found one or more proper aggravating circumstances, but likewise based sentence on one or more improper aggravating circumstances, remandment to trial court for new sentencing hearing should be mandated by appellate court finding aggravating circumstances improper. Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Crime charged in indictment cannot be used as both criminal charge and circumstances aggravating that charge. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Options in sentencing. — In any case in which the jury finds the defendant guilty and imposes the death sentence, the trial court is required to hold a presentence hearing to determine whether to sentence the defendant to death or to life imprisonment without parole; these are the only options for the sentencing authority. Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979), rev'd on other grounds, 628 F.2d 400 (5th Cir. 1980).

§ 13A-5-46. Same — Conducted before jury unless waived; trial jury to sit for unless impossible or impracticable; separation of jury; instructions to jury; advisory verdicts; vote required; mistrial; waiver of right to advisory verdict.

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case.

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the

relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return.

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(3) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

(f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least ten jurors. The verdict of the jury must be in writing and must specify the vote.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury. (Acts 1981, No. 81-178, § 8.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-33 are included in the annotations for this section.

Sentencing hearing should not serve function of hearing on petition for writ of error coram nobis. Once having litigated this issue before the same judge who conducted the sentencing hearing, and a determination having been made that the allegations were without merit, the defendant had no right to relitigate the same issue and argue contentions which had already been determined to be without factual support. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 406 So. 2d 695 (Ala. 1981).

Jury verdict not binding on trial court. — The requirement that the jury fix the punishment at death if it finds the defendant guilty of a capital offense is in no way binding on the trial court as the final sentencing authority. Beck v. State, 396 So. 2d 645 (Ala. 1980).

Act not mandatory where judge empowered to alter jury verdict. — Before a death penalty can be imposed in Alabama, the trial judge is compelled to hold a separate hearing and make written findings of one or more of the aggravating circumstances set forth in the act. If the trial judge fails to find one or more aggravating circumstances, supported by the evidence, he is empowered to alter the verdict of the jury and sentence the defendant to life imprisonment without parole. Since the verdict of the jury is not binding on the trial court the act cannot under any construction be classed as mandatory. Williamson v. State, 370 So. 2d 1054 (Ala. Crim. App. 1978), aff'd, 370 So. 2d 1066 (Ala. 1979), rev'd on remand, 406 So. 2d 698 (Ala. Crim. App. 1981).

But crime charged in indictment cannot be used as both criminal charge and circumstance aggravating that charge. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Appellate court does not have statutory authority to reduce penalty and resentence the appellant itself. That duty is vested in the trial court. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1573-1576.

21 Am. Jur. 2d, Criminal Law, §§ 527, 586.

§ 13A-5-47. Determination of sentence by court; pre-sentence investigation report; presentation of arguments on aggravating and mitigating circumstances; court to enter written findings; court not bound by sentence recommended by jury.

(a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in section 13A-5-46(a) or section 13A-5-46(g), the trial court shall proceed to determine the sentence.

(b) Before making the sentence determination, the trial court shall order and receive a written pre-sentence investigation report. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court. No part of the report shall be kept confidential, and the parties shall have the right to respond to it and to present evidence to the court about any part of the report which is the subject of factual dispute. The report and any evidence submitted in connection with it shall be made part of the record in the case.

(c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case. The order of the arguments shall be the same as at the trial of a case.

(d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in section 13A-5-49, each mitigating circumstance enumerated in section 13A-5-51, and any additional mitigating circumstances offered pursuant to section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court. (Acts 1981, No. 81-178, § 9.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-33 are included in the annotations for this section.

Legislative intent. — The legislature intended to permit the trial judge to weigh the aggravated circumstances enumerated. Kyser v. State, 399 So. 2d 330 (Ala. 1981).

Statute does not unconstitutionally confer right to commute upon judge. — The death penalty statute does not violate the Constitution by conferring upon the trial judge the right to commute a sentence of death. Beck v. State, 365 So. 2d 985 (Ala. Crim. App. 1978), aff'd, 365 So. 2d 1006 (Ala. 1978), rev'd on other grounds, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1980).

The trial court judge and not the jury is the sentencing authority. Beck v. State, 396 So. 2d 645 (Ala. 1980).

The sole purpose of requiring that the trial judge, as the sentencing authority, make a written finding of the aggravating circumstance is to provide for appellate review of the sentence of death. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

The whole purpose of this section and §§ 13A-5-34 through 13A-5-36 (now repealed) is to allow for judicial review of a sentence of death fixed by the jury. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

If no mitigating circumstances exist, the order should so state. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

And cause must be remanded for court's order to be extended. — Where court's order is insufficient because it did not specify mitigating circumstances enumerated in the statute which it found insufficient to outweigh aggravating circumstances; cause must be remanded with instructions that court's order be extended to include findings of fact from trial and mitigating circumstances, if any, considered as required by statute. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

For circumstances, where sentence of life imprisonment without parole was not disproportionate and did not constitute cruel and unusual punishment, see McGinnis v. State, 382 So. 2d 605 (Ala. Crim. App. 1979), cert. denied, 382 So. 2d 609 (Ala. 1980).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1573-1576.

21 Am. Jur. 2d, Criminal Law, §§ 527, 586.

§ 13A-5-48. Process of weighing aggravating and mitigating circumstances defined.

The process described in sections 13A-5-46(e)(2), 13A-5-46(e)(3) and section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death. (Acts 1981, No. 81-178, § 10.)

Collateral references. — 24 C.J.S., Criminal Law, § 1573.

21 Am. Jur. 2d, Criminal Law, §§ 527, 584.

§ 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital offense was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight

after committing, or attempting to commit, rape, robbery, burglary or kidnapping;

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. (Acts 1981, No. 81-178, § 11.)

I. General Consideration.
II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

Section must be strictly followed. — It is imperative that trial courts in setting out aggravating circumstances follow as closely as possible the strict wording of this section. An inclination to gradually broaden the scope of aggravating circumstances beyond the strict wording of the statute will eventually lead to an unconstitutional application of the capital felony statute. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation. This is especially true in death penalty cases. Penal statutes are to reach no further in meaning than their words. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Crime charged in indictment cannot be used as both criminal charge and circumstance aggravating that charge. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

A finding of only one aggravating circumstance is sufficient to sustain the death penalty. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes. 100 ALR3d 431.

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-35 are included in the annotations for this section.

The whole purpose of former §§ 13A-5-33, 13A-5-34, this section and § 13A-5-36 (procedure for sentencing hearing before the judge) (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

The language of subdivision (5) cannot have been intended by the legislature to have such an expansive application as to be applied in all felony cases in which death has ensued, for it could be said that one of the purposes of inflicting any death would be to prevent identification by the victim. Ex parte Johnson, 399 So. 2d 873 (Ala. 1979).

The aggravating circumstance listed in subsection (8) was intended to apply to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Finding "aggravation" not listed in section. — The jury, and the trial judge at the sentencing hearing, may find the "aggravation" averred in the indictment was not listed in this section as an "aggravating circumstance." The jury or trial judge, as applicable, will weigh the "aggravation" or "aggravating circumstance" against any mitigating circumstances in determining whether to impose a sentence of death. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

The "capital felony" referred to in this section refers to an intentional killing, not to "kidnapping," "robbery," "rape," etc. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Johnson v. State, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

A finding that the homicides were "brutal" fails to conform to this section which requires a finding that the crimes was "especially heinous, atrocious or cruel." The crime was in fact brutal, but the statute requires more. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

The first-degree murder of two or more victims is not, by definition, especially heinous, atrocious or cruel. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

"Great risk to many persons" not applicable to two robbery victims. — The aggravating circumstance that the defendant knowingly created a great risk of death to many persons is not applicable to the situation where the only possible risk of death is to the two victims of the robbery. Ashlock v. State, 367 So. 2d 560 (Ala. Crim. App. 1978), cert. denied, 367 So. 2d 562 (Ala. 1979).

Pecuniary gain covers murder-for-hire not stealing money. — The aggravating circumstance that the capital felony was committed for pecuniary gain covers the "murder-for-hire" situation and not the circumstance where the intentional killing was committed by the appellant while stealing money. Ashlock v. State, 367 So. 2d 560 (Ala. Crim. App. 1978), cert. denied, 367 So. 2d 562 (Ala. 1979).

To avoid repetition, subdivision (6) of this section should not be applied to a robbery. Cook v. State, 369 So. 2d 1251 (Ala. 1978).

Pecuniary gain may not be used as an aggravating circumstance in a case of capital robbery. Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980); Johnson v. State, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

Prior criminal history. — The only aggravating circumstances relating to a defendant's prior criminal history which may be considered are set out in subdivision (2) of this section. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Use against an individual of unproven charges is prohibited in this life or death situation. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Only evidence of adjudicated charge, not original charge admissible. — It is not appropriate, in considering a previously adjudicated criminal charge, to admit evidence of the original charge of assault with intent to murder, which was reduced to malicious destruction of property; instead the court must rely on the prior judge's decision that defendant's acts were most appropriately treated as malicious destruction of property. Cook v. State, 369 So. 2d 1251 (Ala. 1978).

Defendant's prior convictions for assault and battery and abusive language held not convictions of felony as required by subsection (2). Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Inappropriate findings of aggravation. — Findings of fact that the robbery was committed for "pecuniary gain" and that the killing was "unnecessary," are inappropriate. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

That a capital felony was "hateful" is not an aggravating circumstance set out in the statute. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

This section does not allow a crime against property by stealth to be set out as an aggravating circumstance. Neither does it enumerate as an aggravating circumstance that a defendant served time in a number of penitentiaries. Mack v. State, 375 So. 2d 476 (Ala. Crim. App. 1978), aff'd, 375 So. 2d 504 (Ala. 1979), vacated, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1134 (1980), rev'd on remand, 405 So. 2d 701 (Ala. Crim. App. 1981).

An absence of provocation is not an aggravating circumstance listed in the capital felony section. Such a finding has no more legal effect than a finding that the crime was "unnecessary." Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Robbery cannot be aggravated by robbery or else defendant is punished twice for same act. Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Where defendant found guilty of "robbery or attempt thereof when the victim is intentionally killed by the defendant" primary element of instant charge, robbery, cannot be used to aggravate same charge. Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Fact that capital felony was committed by a person under sentence of imprisonment may be considered under subsection (1) as aggravating circumstance. Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Appellate court must independently weigh the aggravating and mitigating circumstances in a capital case. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

For trial court finding that crime was especially heinous, atrocious, and cruel under subsection (8), see Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

§ 13A-5-50. Consideration of aggravating circumstances in sentence determination.

The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.

By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40. (Acts 1981, No. 81-178, § 12.)

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).
21 Am. Jur. 2d, Criminal Law, § 584.

§ 13A-5-51. Mitigating circumstances — Generally.

Mitigating circumstances shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to it;

(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1981, No. 81-178, § 13.)

I. General Consideration.
II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

Analysis of mitigating circumstances should be based on this section. — The safer practice would be for a trial judge to simply follow the verbiage of this section in negating aggravating circumstances rather than devising his own tests. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-36 are included in the annotations for this section.

The whole purpose of former §§ 13A-5-33 through 13A-5-36 (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Subsections (2) and (6) of this section were concerned with the degree of the

accused's mental disability. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Scheme allows accused to present mitigating evidence. — Alabama's sentencing scheme in death cases broadly allows the accused to present evidence of mitigating circumstances. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979).

As constitutionally indispensable part of death penalty process. — Alabama's sentencing process in death cases permits consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979).

Defendant permitted to introduce any matter relating to mitigating circumstances. — At the sentencing hearing before the jury, the court must permit the defendant to introduce any matter relating to any mitigating circumstances including those enumerated in this section. Beck v. State, 396 So. 2d 645 (Ala. 1980).

But existence of mitigating circumstances does not necessarily require reduction of punishment from death to life imprisonment without parole. They must be considered with, and weighed against, aggravating circumstances and the extent of aggravation of such circumstances. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

A pending charge cannot be considered as criminal history. Cook v. State, 369 So. 2d 1251 (Ala. 1978).

The legislature has indicated that lack of a significant criminal history should operate in a convicted individual's favor, and a court cannot qualify this provision by relying on prior criminal activity which does not rise to the level established by the legislature. Cook v. State, 369 So. 2d 1251 (Ala. 1978).

Where sub-normality of defendant's mind is great, the fixation of his punishment at death should not be allowed to stand. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

Appellate court must independently weigh aggravating and mitigating circumstances in a capital case. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

If no mitigating circumstances exist, the order should so state. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

And cause must be remanded to extend court's order. — Where court's order is insufficient because it did not specify mitigating circumstances enumerated in this section which it found insufficient to outweigh aggravating circumstances; cause must be remanded with instructions that court's order be extended to include findings of fact from trial and mitigating circumstances, if any, considered as required by statute. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

Trial court's finding that defendant's age of 23 was insufficient to outweigh aggravating circumstances not error. Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

For case where the sentencing court made an independent assessment of the evidence presented and determined, independently of the jury's verdict, that the statutory mitigating circumstances were inapplicable to the appellant, see Kyzer v. State, 399 So. 2d 317 (Ala. Crim. App. 1979), rev'd on other grounds, 399 So. 2d 330 (Ala. 1981).

§ 13A-5-52. Same — Inclusion of defendant's character, record, etc.

In addition to the mitigating circumstances specified in section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death. (Acts 1981, No. 81-178, § 14.)

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).
21 Am. Jur. 2d, Criminal Law, § 584.

§ 13A-5-53. Appellate review of death sentence; scope; remand; specific determinations to be made by court; authority of court following review.

(a) In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall also review the propriety of the death sentence. This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings or that one or more of the trial court's findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court's findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence.

(b) In determining whether death was the proper sentence in the case the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(c) The court of criminal appeals shall explicitly address each of the three questions specified in subsection (b) of this section in every case it reviews in which a sentence of death has been imposed.

(d) After performing the review specified in this section, the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall be authorized to:

(1) Affirm the sentence of death;

(2) Set the sentence of death aside and remand to the trial court for correction of any errors occurring during the sentence proceedings and for imposition of the appropriate penalty after any new sentence proceedings that are necessary, provided that such errors shall not affect the determination of guilt and shall not preclude the imposition of a sentence of death where it is determined to be proper after any new sentence proceedings that are deemed necessary; or

(3) In cases in which the death penalty is deemed inappropriate under subdivision (b)(2) or (b)(3) of this section, set the sentence of death aside and remand to the trial court with directions that the defendant be sentenced to life imprisonment without parole. (Acts 1981, No. 81-178, § 15.)

Collateral references. — 24 C.J.S., Criminal Law, §§ 1643-1647, 1831-1840.
5 Am. Jur. 2d, Appeal and Error, § 723.

§ 13A-5-54. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1981, No. 81-178, § 16.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-37 are included in the annotations for this section.

This section does not require the record to show that appointed counsel has at least five years' prior experience in the active practice of criminal law; it simply requires that the indigent accused be provided such counsel. Absent some tangible indication that the requirements were not met, a court cannot summarily rule, as a matter of law, that the statute was not complied with. Johnson v. State, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

Appointment in keeping with section. — Where an attorney has practiced criminal law at the call of the criminal docket in the county for 10 years, his appointment to a case involving a capital felony is in keeping with the provision of this section requiring not less than five years prior experience in the active practice of criminal law. Jacobs v. State, 371 So. 2d 429 (Ala. Crim. App. 1977), rev'd on other grounds, 371 So. 2d 448 (Ala. 1979).

Collateral references. — 23 C.J.S., Criminal Law, § 979(1).
21 Am. Jur. 2d, Criminal Law, §§ 309-317.
Accused's right to represent himself in state criminal proceeding — modern state cases. 98 ALR3d 13.

§ 13A-5-55. Conviction and sentence of death subject to automatic review.

In all cases in which a defendant is sentenced to death, the judgment of conviction shall be subject to automatic review. The sentence of death shall be subject to review as provided in section 13A-5-53. (Acts 1981, No. 81-178, § 17.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-34 are included in the annotations for this section.

The whole purpose of §§ 13A-5-33 through 13A-5-36 (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Scope of review. — Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant. In making this final determination, the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any. Beck v. State, 396 So. 2d 645 (Ala. 1980).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1643-1647, 1831-1840.
5 Am. Jur. 2d, Appeal and Error, § 723.

Code commissioner's note. — This section is set out herein to correct a typographical error in the bound volume.

Cited in Lindsey v. State, 456 So. 2d 383 (Ala. Crim. App. 1983); Kennedy v. State, 472 So. 2d 1106 (Ala. 1985).

§ 13A-5-42. Guilty plea; burden of proof upon state; waiver; sentencing.

Effect of guilty plea. — As a general rule a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings. Cox v. State, 462 So. 2d 1047 (Ala. Crim. App. 1985).

A plea of guilty is an admission of all the elements of the offense. It is a waiver of rights guaranteed by the due process clause of the Fifth Amendment. Cox v. State, 462 So. 2d 1047 (Ala. Crim. App. 1985).

A voluntary guilty plea waives the right to a preliminary hearing. Cox v. State, 462 So. 2d 1047 (Ala. Crim. App. 1985).

A guilty plea, if voluntarily and understandingly made, waives all nonjuriadictional defects in the prior proceedings against an accused. Cox v. State, 462 So. 2d 1047 (Ala. Crim. App. 1985).

Cited in Jackson v. State, 452 So. 2d 895 (Ala. Crim. App. 1984).

Collateral references.

Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial. 17 ALR4th 61.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment. 31 ALR4th 504.

§ 13A-5-45. Sentence hearing — Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

I. GENERAL CONSIDERATION.

It is not error to allow jurors to "weigh" the aggravating and mitigating factors, as opposed to determining them under a reasonable doubt standard. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

While the aggravating circumstances must be proven beyond a reasonable doubt, the jury may return the death penalty if it simply does not find that the aggravating circumstances are outweighed by the mitigating circumstances. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

Jury may not ignore any factor. — It is the duty of the jury to weigh mitigating and aggravating circumstances in its decision. The jury is not free to arbitrarily ignore any factor, positive or negative, in arriving at the correct sentence. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

The harmless error rule applies in capital cases at the sentence hearing. Whisenhant v. State, 482 So. 2d 1241 (Ala. 1983).

Prosecutor's remarks held reversible error. — Remarks of prosecutor during the sentencing phase closing argument of the state, suggesting that a sentence of life imprisonment without parole might not prevent defendant from, at some time, being released from prison, constituted reversible error. Rutledge v. State, 482 So. 2d 1262 (Ala. 1964).

Penalty phase of defendant's trial was impermissibly prejudiced by the prosecutor's references in his opening statement to several offenses allegedly committed by defendant as to which no evidence was ever introduced. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

Remarks made by the attorney general during his opening statement at the penalty phase of capital murder trial constituted error, and such error was not harmless. Whisenhant v. State, 482 So. 2d 1247 (Ala. 1984).

Cited in Curtis v. State, 424 So. 2d 679 (Ala. Crim. App. 1982); Luka v. State, 444 So. 2d 393 (Ala. Crim. App. 1983).

Collateral references.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions. 40 ALR4th 514.

II. DECISIONS UNDER PRIOR LAW.

Constitutionality of former scheme. — Alabama's former statutory scheme of fixing capital punishment under repealed §§ 13-11-2 to 13-11-6, which required that a jury return an automatic "sentence" of death along with its guilty verdict, while unusual, did not render unconstitutional the death sentence the trial judge imposed, where the trial court operated as the true sentencing authority after independently considering the condemned person's

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background and character and the circumstances of his crime and weighing specified aggravating and mitigating circumstances. Baldwin v. Alabama, — U.S. —, 105 S. Ct. 2727, — L. Ed. 2d — (1985) (decided under prior law).

§ 13A-5-46. Same — Conducted before jury unless waived; trial jury to sit for unless impossible or impracticable; separation of jury; instructions to jury; advisory verdicts; vote required; mistrial; waiver of right to advisory verdict.

Constitutionality of former scheme. — Alabama's former statutory scheme of fixing capital punishment under repealed §§ 13-11-2 to 13-11-6, which required that a jury return an automatic "sentence" of death along with its guilty verdict, while unusual, did not render unconstitutional the death sentence the trial judge imposed, where the trial court operated as the true sentencing authority after independently considering the condemned person's background and character and the circumstances of his crime and weighing specified aggravating and mitigating circumstances. Baldwin v. Alabama, — U.S. —, 105 S. Ct. 2727, — L. Ed. 2d — (1985) (decided under prior law).

Veniremen with fixed opinions against the death penalty were properly dismissed for cause, even though subsection (f) of this section permits a death penalty verdict on the vote of only 10 of the 12 trial jurors. Callahan v. State, 471 So. 2d 447 (Ala. Crim. App. 1983), rev'd on other grounds, 471 So. 2d 463 (Ala.), cert. denied, — U.S. —, 106 S. Ct. 567, 88 L. Ed. 2d 552 (1985).

Jury not required to make specific findings of aggravating circumstances. — There is no requirement under Alabama's new capital felony statute that the jury make specific findings as to the existence of aggravating circumstances during the sentencing phase of the proceedings. The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only. It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentence, is required to enter specific written findings concerning the existence or nonexistence of each aggravating circumstance. Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982), aff'd, 431 So. 2d 563 (Ala.), cert. denied, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983).

Procedural and legal effect of jury's inability to reach a unanimous verdict need not be divulged to the jury. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

The harmless error rule applies in capital cases at the sentence hearing. Whisenhant v. State, 482 So. 2d 1241 (Ala. 1983).

Prosecutor's remarks held reversible error. — Remarks of prosecutor during the sentencing phase closing argument of the state, suggesting that a sentence of life imprisonment without parole might not prevent defendant from, at some time, being released from prison, constituted reversible error. Rutledge v. State, 482 So. 2d 1262 (Ala. 1984).

Remarks made by the attorney general during his opening statement at the penalty phase of a capital murder trial constituted error, and such error was not harmless. Whisenhant v. State, 482 So. 2d 1247 (Ala. 1984).

Cited in Jackson v. State, 452 So. 2d 895 (Ala. Crim. App. 1984); Harrell v. State, 470 So. 2d 1309 (Ala. 1985); Jefferson v. State, 473 So. 2d 1100 (Ala. Crim. App. 1984), aff'd, 473 So. 2d 1110 (Ala. 1985).

§ 13A-5-47. Determination of sentence by court; pre-sentence investigation report; presentation of arguments on aggravating and mitigating circumstances; court to enter written findings; court not bound by sentence recommended by jury.

Constitutionality of former scheme. — Alabama's former statutory scheme of fixing capital punishment under repealed §§ 13-11-2 to 13-11-6, which required that a jury return an automatic "sentence" of death along with its guilty verdict, while unusual, did not render unconstitutional the death sentence the trial judge imposed, where the trial court operated as the true sentencing authority after independently considering the condemned person's

background and character and the circumstances of his crime and weighing specified aggravating and mitigating circumstances. Baldwin v. Alabama, — U.S. —, 105 S. Ct. 2727, — L. Ed. 2d — (1985) (decided under prior law).

Legislative intent.

This statute clearly reveals the legislative intent that the jury's recommendation is advisory only and thus is not binding upon the trial court. Where plain language is used, the statute must be interpreted to mean exactly what it says. Jones v. State, 456 So. 2d 380 (Ala. 1984).

Subsection (e) of this section is a clear expression of what the legislature intended. The jury's decision is labeled a "recommendation" or "advisory verdict" throughout the statute and it is plainly stated that their decision is not binding on the trial judge. Murry v. State, 455 So. 2d 53 (Ala. Crim. App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984).

It is the trial judge, who at a separate hearing, determines whether or not the defendant is to suffer death or life imprisonment without parole. The verdict of the jury is advisory only. No sentence exists until the pronouncement by the trial judge at the conclusion of the sentence hearing. Murry v. State, 455 So. 2d 53 (Ala. Crim. App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984).

Jury not required to make specific findings of aggravating circumstances. — There is no requirement under Alabama's new capital felony statute that the jury make specific findings as to the existence of aggravating circumstances during the sentencing phase of the proceedings. The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only. It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentence, is required to enter specific written findings concerning the existence or nonexistence of each aggravating circumstance. Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982), aff'd, 431 So. 2d 563 (Ala.), cert. denied, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983).

When the death penalty is imposed, the trial judge must review and issue written findings of fact setting forth his determination of sentence. These written findings of the trial court, which must set forth both aggravating and mitigating circumstances, provide the basis necessary for the review of the imposition of the death penalty. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

The trial judge is allowed to increase the jury's recommendations of life imprisonment without parole to the death sentence. Murry v. State, 455 So. 2d 53 (Ala. Crim. App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984).

The harmless error rule applies in capital cases at the sentence hearing. Whisenhant v. State, 482 So. 2d 1241 (Ala. 1983).

Prosecutor's remarks held reversible error. — Remarks of prosecutor during the sentencing phase closing argument of the state, suggesting that a sentence of life imprisonment without parole might not prevent defendant from, at some time, being released from prison, constituted reversible error. Rutledge v. State, 482 So. 2d 1262 (Ala. 1984).

Remarks made by the attorney general during his opening statement at the penalty phase of a capital murder trial constituted error, and such error was not harmless. Whisenhant v. State, 482 So. 2d 1247 (Ala. 1984).

Cited in Womack v. State, 435 So. 2d 754 (Ala. Crim. App. 1983); Luke v. State, 444 So. 2d 393 (Ala. Crim. App. 1983); Luke v. State, 444 So. 2d 400 (Ala. 1983); Jones v. State, 450 So. 2d 171 (Ala. 1984); Heath v. State, 455 So. 2d 898 (Ala. Crim. App. 1983); Jones v. State, 456 So. 2d 366 (Ala. Crim. App. 1983); Lindsey v. State, 456 So. 2d 383 (Ala. Crim. App. 1983); Singleton v. State, 466 So. 2d 432 (Ala. Crim. App. 1983); Harrell v. State, 470 So. 2d 1303 (Ala. Crim. App. 1984); Harrell v. State, 470 So. 2d 1309 (Ala. 1985).

§ 13A-5-48. Process of weighing aggravating and mitigating circumstances defined.

Constitutionality of former scheme. — Alabama's former statutory scheme of fixing capital punishment under repealed §§ 13-11-2 to 13-11-6, which required that a jury return an automatic "sentence" of death along with its guilty verdict, while unusual, did not render unconstitutional the death sentence the trial judge imposed, where the trial court operated as the true sentencing authority after independently considering the condemned person's background and character and the circumstances of his crime and weighing specified aggravating and mitigating circumstances. Baldwin v. Alabama, — U.S. —, 105 S. Ct. 2727, — L. Ed. 2d — (1985) (decided under prior law).

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e true sentencing authority after indepen- ly considering the condemned person's ground and character and the circum- ces of his crime and weighing specified avating and mitigating circumstances. (win v. Alabama, — U.S. —, 106 S. Ct. , — L. Ed. 2d — (1986) (decided under law).

It is not error to allow Alabama jurors to "weigh" the aggravating and mitigating factors, as opposed to determining them under a reasonable doubt standard. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

While the aggravating circumstances must be proven beyond a reasonable doubt, the jury may return the death penalty if it simply does not find the aggravating circumstances are outweighed by the mitigating circumstances. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

Jury may not ignore any factor. — It is the duty of the jury to weigh mitigating and aggravating circumstances in its decision. The jury is not free to arbitrarily ignore any factor, positive or negative, in arriving at the correct sentence. Whisenhant v. State, 482 So. 2d 1225 (Ala. Crim. App. 1982).

The determination of whether the aggravating circumstances outweigh the mitigating circumstances and vice versa, is not a numerical one. It is based on the gravity of the aggravating circumstances compared to that of the mitigating circumstances. Murry v. State, 455 So. 2d 53 (Ala. Crim. App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984).

The process of weighing the aggravating and mitigating circumstances is a balancing process wherein one aggravating circumstance may outweigh any amount of mitigating evidence or any number of statutory mitigating circumstances. On the other hand, the sentencer may give one mitigating factor, whether or not defined by statute, such emphasis that it outweighs several aggravating circumstances. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. Clisby v. State, 456 So. 2d 105 (Ala. 1984), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

There is no statutory or constitutional requirement that the jury make specific findings of aggravating or mitigating circumstances considered during the sentence phase of the proceedings. The jury's verdict is advisory only. It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentencing, is required to make written findings concerning the existence or non-existence of each aggravating and mitigating circumstance. Clisby v. State, 456 So. 2d 105 (Ala. 1984), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The harmless error rule applies in capital cases at the sentence hearing. Whisenhant v. State, 482 So. 2d 1241 (Ala. 1983).

Prosecutor's remarks held reversible error. — Remarks made by the attorney general during his opening statement at the penalty phase of capital murder trial constituted error, and such error was not harmless. Whisenhant v. State, 482 So. 2d 1247 (Ala. 1984). See also, Rutledge v. State, 482 So. 2d 1262 (Ala. 1984).

§ 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital offense was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping;

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. (Acts 1981, No. 81-178, p. 203, § 11; Acts 1982, No. 82-567, p. 945, § 1.)

Code commissioner's note. — This section is set out herein to correct a typographical error in the bound volume.

I. GENERAL CONSIDERATION.

A defendant's conviction for a crime of violence can be an aggravating circumstance. Baldwin v. State, 456 So. 2d 117 (Ala. Crim. App. 1983), aff'd, 456 So. 2d 129 (Ala. 1984).

A finding of only one aggravating circumstance, etc.

In accord with bound volume. See Murry v. State, 455 So. 2d 53 (Ala. Crim. App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984).

Youthful offenders. — Under the Alabama statute, after one is adjudged a youthful offender, any determination of guilt shall not be deemed a conviction, and thus, could not be an aggravating circumstance under subdivision (2). Baldwin v. State, 456 So. 2d 117 (Ala. Crim. App. 1983), aff'd, 456 So. 2d 129 (Ala. 1984).

Adjudication of guilt in juvenile proceedings does not fall within one of the aggravating circumstances enumerated in this section. Baldwin v. State, 456 So. 2d 117 (Ala. Crim. App. 1983), aff'd, 456 So. 2d 129 (Ala. 1984)

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982); Dobard v. State, 435 So. 2d 1351 (Ala. 1983); Luke v. State, 444 So. 2d 393 (Ala. Crim. App. 1983); Jones v. State, 450 So. 2d 165 (Ala. Crim. App. 1983); Jones v. State, 456 So. 2d 366 (Ala. Crim. App. 1983); Lindsey v. State, 456 So. 2d 383 (Ala. Crim. App. 1983); Waldrop v. State, 459 So. 2d 963 (Ala. Crim. App. 1983); Singleton v. State, 465 So. 2d 432 (Ala. Crim. App. 1983); Arthur v. State, 472 So. 2d 650 (Ala. Crim. App. 1984); Heath v. Alabama, — U.S. —, 106 S. Ct. 433, — L. Ed. 2d — (1985).

§ 13A-5-50. Consideration of aggravating circumstances in sentence determination.

The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40. (Acts 1981, No. 81-178, p. 203, § 12; Acts 1982, No. 82-567, p. 945, § 1.)

Code commissioner's note. — This section is set out herein to correct a typographical error in the bound volume.

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982); Heath v. State, 455 So. 2d 898 (Ala. Crim. App. 1983); Heath v. Alabama, — U.S. —, 106 S. Ct. 433, — L. Ed. 2d — (1985).

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366 (Ala. Crim. App. 1983); Lindsey
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State, 459 So. 2d 953 (Ala. Crim.
; Singleton v. State, 465 So. 2d 432
. App. 1983); Arthur v. State, 472
(Ala. Crim. App. 1984); Heath v.
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1982); Heath v. State, 456 So. 2d
m. App. 1983); Heath v. Alabama,
106 S. Ct. 433, — L. Ed. 2d —

§ 13A-5-51. Mitigating circumstances — Generally.

III. Illustrative Cases.

I. GENERAL CONSIDERATION.

Death penalty scheme must allow court to consider any mitigating circumstances. — Subject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense. Further, a death penalty scheme must allow the sentencing authority to consider and give independent weight to mitigating factors in addition to those listed in the death penalty statute. While a sentencing authority may consider only those aggravating circumstances listed in the relevant statute, it may consider any mitigating factors that it wishes. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The constitution requires that the sentencer in capital cases must be permitted to consider any relevant mitigating circumstance. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. Clisby v. State, 456 So. 2d 105 (Ala. 1984), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation. Clisby v. State, 456 So. 2d 105 (Ala. 1984), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The court must permit the defendant to introduce any matter relating to any mitigating circumstances including those enumerated in the Code. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The sentencer may not as a matter of law preclude any relevant mitigating factors offered by a defendant. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Effect of mitigating circumstances. — The existence of a mitigating circumstance does not necessarily require a sentence of life imprisonment without parole rather than death. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982); Dobard v. State, 435 So. 2d 1338 (Ala. Crim. App. 1982), aff'd, 435 So. 2d 1351 (Ala. 1983); Luke v. State, 444 So. 2d 393 (Ala. Crim. App. 1983); Jones v. State, 456 So. 2d 366 (Ala. Crim. App. 1983); Lindsey v. State, 456 So. 2d 383 (Ala. Crim. App. 1983); Lindsey v. State, 456 So. 2d 393 (Ala. 1984); Waldrop v. State, 459 So. 2d 953 (Ala. Crim. App. 1983); Singleton v. State, 465 So. 2d 432 (Ala. Crim. App. 1983); Harrell v. State, 470 So. 2d 1303 (Ala. Crim. App. 1984).

III. ILLUSTRATIVE CASES.

Antisocial personality. — Where evidence was presented that the defendant has an antisocial personality, the defendant's mental or emotional disturbance must be considered as relevant mitigating evidence. However, it is for the trial judge to determine the weight to be given that evidence. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Evidence of a difficult family history and of emotional disturbance constitutes relevant mitigating evidence. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

§ 13A-5-52. Same — Inclusion of defendant's character, record, etc.

The court must permit the defendant to introduce any matter relating to any mitigating circumstances including those enumerated in the Code. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Subject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense. Further, a death penalty scheme must allow the sentencing authority to consider and give independent weight to mitigating factors in addition to those listed in the death penalty statute. While a sentencing authority may consider only those aggravating circumstances listed in the relevant statute, it may consider any mitigating factors that it wishes. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

The sentencer may not as a matter of law preclude any relevant mitigating factors offered by a defendant. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Effect of mitigating circumstances. — The existence of a mitigating circumstance does not necessarily require a sentence of life imprisonment without parole rather than death. Clisby v. State, 456 So. 2d 99 (Ala. Crim. App. 1983), cert. denied, — U.S. —, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985).

Alleged remorse properly discounted. — In light of evidence presented against defendant, including evidence of a prior conviction for second degree murder, a prior conviction for assault with intent to rob, and eyewitness testimony that he was seen running from the scene of the murder "clapping his hands with a big smile on his face," the trial judge could have properly discounted defendant's alleged remorse and his cooperation as not being truly mitigating. Harrell v. State, 470 So. 2d 1309 (Ala.), cert. denied, — U.S. —, 106 S. Ct. 289, 88 L. Ed. 2d 276 (1985).

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982); Luke v. State, 444 So. 2d 393 (Ala. Crim. App. 1983); Heath v. State, 455 So. 2d 898 (Ala. Crim. App. 1983); Lindsey v. State, 456 So. 2d 383 (Ala. Crim. App. 1983); Waldrop v. State, 459 So. 2d 953 (Ala. Crim. App. 1983); Harrell v. State, 470 So. 2d 1303 (Ala. Crim. App. 1984).

§ 13A-5-53. Appellate review of death sentence; scope; remand; specific determinations to be made by court; authority of court following review.

Death sentence would be upheld for defendant who burglarized a house and then beat, terrorized, raped, and suffocated to death a helpless 86-year-old woman. Grayson v. State, 479 So. 2d 76 (Ala. 1985).

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982); Bush v. State, 431 So. 2d 563 (Ala. 1983); Luke v. State, 444 So. 2d 393 (Ala. Crim. App. 1983); Jones v. State, 450 So. 2d 165 (Ala. Crim. App. 1983); Murry v. State, 455 So. 2d 53 (Ala. Crim. App. 1983); Heath v. State, 455 So. 2d 898 (Ala. Crim. App. 1983); Hill v. State, 455 So. 2d 930 (Ala. Crim. App. 1984); Clisby v. State, 456 So. 2d 102 (Ala. Crim. App. 1983); Clisby v. State, 456 So. 2d 105 (Ala. 1984); Baldwin v. State, 456 So. 2d 117 (Ala. Crim. App. 1983); Jones v. State, 456 So. 2d 366 (Ala. Crim. App. 1983); Jones v. State, 456 So. 2d 380 (Ala. 1984); Lindsey v. State, 456 So. 2d 383 (Ala. Crim. App. 1983); Lindsey v. State, 456 So. 2d 393 (Ala. 1984); Weeks v. State, 456 So. 2d 396 (Ala. Crim. App. 1983); Waldrop v. State, 459 So. 2d 953 (Ala. Crim. App. 1983); Waldrop v. State, 459 So. 2d 959 (Ala. 1984); Harrell v. State, 470 So. 2d 1303 (Ala. Crim. App. 1984); Felder v. State, 470 So. 2d 1321 (Ala. Crim. App. 1984); Callahan v. State, 471 So. 2d 447 (Ala. Crim. App. 1983); Baldwin v. Alabama, — U.S. —, 106 S. Ct. 2727, — L. Ed. 2d — (1985); Arthur v. State, 472 So. 2d 650 (Ala. Crim. App. 1984); Kennedy v. State, 472 So. 2d 1092 (Ala. Crim. App. 1984); Kennedy v. State, 472 So. 2d 1106 (Ala. 1985); Jefferson v. State, 473 So. 2d 1100 (Ala. Crim. App. 1984); Jefferson v. State, 473 So. 2d 1110 (Ala. 1985); Bell v. State, 475 So. 2d 601 (Ala. Crim. App. 1984); Bell v. State, 475 So. 2d 609 (Ala. 1985); Horsley v. State, 476 So. 2d 623 (Ala. Crim. App. 1983).

APPENDIX "E"

DEPARTMENT OF SOCIOLOGY • UNIVERSITY OF FLORIDA
GAINESVILLE • FLORIDA • 32611
904 392-0265
Phone signer direct at 392-0255

March 7, 1988

Mr. Dennis Balske
P.O. Box 2104
Montgomery, AL 36102-2104

Dear Mr. Balske:

I completed my Ph.D. in sociology at Purdue University in 1977, and then completed two years of Postdoctoral training in Psychiatry at the University of Wisconsin in 1979. Later that year I came to the University of Florida, where I am now an Associate Professor of Sociology.

In the past seven years I have published a dozen major papers relating to capital punishment in the country's top sociology, criminology, and law journals. As part of my research, I collect data on all post-Furman capital cases in Florida.

Since Florida's current death penalty statute was enacted in December, 1972, there have been 526 death sentences imposed (or reimposed) in the state. Of those 526 death sentences, 113 (21.5 percent) involved jury recommendations of life imprisonment. Of the 113, 93 have been decided by the Florida supreme Court on direct appeal. Of the 93, 27 were affirmed (the defendants in some of these cases have later had their death sentences vacated). Of the remaining 66, 52 sentences were reduced to life, 9 inmates received a new trial, 4 defendants were remanded to trial court for new sentencing, and one case was dismissed because of insufficiency of the evidence.

Yours Sincerely,

Michael L. Radelet

Michael L. Radelet, Ph.D.
Associate Professor

Sworn to and subscribed before me this 8th day of March, 1988.

Nadine D. Lilli
NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. MAY 2, 1990
BONDED THRU GENERAL INS. UND.

No. 87-7098

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

ANTHONY KEITH JOHNSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RECORD

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT GRANT CERTIORARI WHERE NONE OF THE ISSUES PRESENTED WERE RAISED OR DECIDED BELOW?

II. ARE PETITIONER'S STATEMENTS REGARDING THE JURY OVERRIDE PROVISION OF ALABAMA'S 1981 CAPITAL MURDER STATUTE MISLEADING AND INCORRECT?

III. SHOULD THIS COURT GRANT CERTIORARI WHERE PETITIONER'S CONTENTION THAT THE JURY OVERRIDE PROVISION CONTRIBUTED TO AN UNRELIABLE DETERMINATION OF GUILT IN HIS CASE IS BASED ON ASSERTIONS NOT SUPPORTED BY THE RECORD?

PARTIES

The caption contains the names of all parties in the court below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

Petitioner's conviction and sentence were affirmed by the Court of Criminal Appeals of Alabama. Johnson v. State, 521 So.2d 1006 (Ala.Cr.App. 1986). The decision of the Court of Criminal Appeals was affirmed by the Supreme Court of Alabama. Ex parte Johnson, 521 So.2d 1018 (Ala. 1988).

JURISDICTION

The Court has no jurisdiction in this case because none of the questions presented were raised in the court below.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VIII

> Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishment be inflicted.

United States Constitution, Amendment XIV (in pertinent part)

> no state shall... deprive any person of life, liberty or property, without due process of law...

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975, § 13A-5-40(a)(2)

> (a) The following are capital offenses:
> (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

Code of Alabama 1975, §13A-5-47(e)

> (e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

A. Statement of the Facts

On March 11, 1984, petitioner shot and killed Kenneth Cantrell during the course of robbing Mr. Cantrell.

B. PROCEEDINGS BELOW

Petitioner was indicted in June 1984 by the Grand Jury of Morgan County, Alabama, for the capital offense of murder during a robbery in the first degree in violation of Code of Alabama 1975, §13A-5-40(a)(2). A jury found petitioner guilty of this offense.

A sentence proceeding was then held before the jury, which recommended a sentence of life imprisonment without parole by a vote of nine-to-three. Upon consideration of the aggravating and mitigating circumstances, however, the trial court rejected the jury's recommendation and sentenced petitioner to death.

Petitioner's case was appealed to the Court of Criminal Appeals of Alabama, which affirmed the conviction and sentence. Johnson v. State, 521 So.2d 1006 (Ala.Cr.App. 1986). A petition for writ of certiorari was granted as a matter of right by the Supreme Court of Alabama, which on February 8, 1988, affirmed the decision of the Court of Criminal Appeals. Ex parte Johnson, 521 So.2d 1018 (Ala. 1988).

SUMMARY OF ARGUMENT

The Court should deny certiorari because the questions presented by petitioner were not raised or decided below.

Petitioner's general statements regarding the jury override provision of Alabama's 1981 capital murder statute are misleading and incorrect. Petitioner's arguments regarding the allegedly distorting effect of this provision on the determination of guilt in his case are not supported by the record.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION AS TO ANY OF THE ISSUES PRESENTED BECAUSE THEY WERE NOT RAISED OR DECIDED BELOW.

Petitioner presents several arguments regarding the provision in Alabama's 1981 capital murder statute, Code of Alabama 1975, §13A-5-39 et seq., allowing the trial court to override a jury's recommendation as to sentence. None of these issues, however, were raised or decided in the courts below. Johnson v. State, 521 So.2d 1006 (Ala.Cr.App. 1986), affirmed, 521 So.2d 1018 (Ala. 1988). This Court has no jurisdiction to decide issues raised here for the first time. Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). For this reason the Court should deny the petition.

II. PETITIONER'S STATEMENTS REGARDING THE JURY OVERRIDE PROVISION UNDER ALABAMA'S 1981 CAPITAL MURDER STATUTE ARE MISLEADING AND INCORRECT.

Petitioner attacks broadly the procedure under Alabama's 1981 capital murder statute which allows the jury's sentence recommendation to be rejected by the trial court. In doing so petitioner relies on several contentions which are misleading or incorrect.

The authority to override is provided under Code of Alabama 1975, §13A-5-47(e), which reads as follows:

> (e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Contrary to the suggestion of petitioner's argument, a jury recommendation in Alabama is not meaningless. The jury recommendation is to be considered, and therefore is a factor in sentencing. Unlike in Florida, where a jury's recommendation of life can be rejected only if it is in essence irrational, a jury's recommendation can be overridden in Alabama if it is contrary to the trial court's weighing of the aggravating and mitigating circumstances.

Petitioner's statements regarding appellate review of death sentences in Alabama is also misleading. Because the rule of Tedder v. State, 322 So.2d 908 (Fla. 1975), has no application in Alabama, Ex parte Jones, 456 So.2d 380 (Ala. 1984), cert. denied, 470 U.S. 1062 (1985), the Alabama appellate courts do not inquire in cases of jury overrides as to whether any reasonable person could agree with the jury's recommendation of life. Appellate review of death sentences focuses instead on a more essential question, the appropriateness of the death sentence itself. In doing so the appellate courts must address the following questions:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Code of Alabama 1975, §13A-5-53(b). This is certainly adequate appellate review. See, Proffitt v. Florida, 428 U.S. 242 (1976).

Petitioner asserts that the application of the Tedder rule in Florida "has further served to increase the reliability of the sentencing process" (petition, p.7). This statement is evidently based on the presumption that juries are more reliable as sentencing authorities than judges, and that the recommendation of a jury therefore must be followed almost invariably. In Spaziano v. Florida, 468 U.S. 447 (1984), this Court rejected the notion of the inherent superiority of jury sentencing in capital cases.

Moreover, petitioner's argument that the Tedder rule is constitutionally required is precluded by Spaziano, in which the Court held that capital sentencing by a judge alone is constitutional. If no jury input whatsoever is required, petitioner cannot argue that any particular standard for rejecting a jury's recommendation is necessary.

For the above reasons petitioner's statements regarding Alabama's jury override provision should be rejected.

III. PETITIONER'S CONTENTION THAT THE JURY OVERRIDE PROVISION CONTRIBUTED TO AN UNRELIABLE DETERMINATION OF GUILT IS BASED ON ASSERTIONS NOT SUPPORTED BY THE RECORD.

Petitioner argues that the jury override provision contributed to an unreliable finding of guilt in his case because, he claims, the jury reached a compromise verdict on guilt under the impression that its sentence verdict of life imprisonment without parole would be binding on the trial court. This claim is based on two factual assertions, neither of which is supported by the record.

Petitioner states first that the jury deliberated for a lengthy period on guilt but only briefly on sentence (petition, pp. 9-10). The record, however, does not reveal the length of time of the deliberations on either conviction or sentence (R. 874-877, 944-950).

Petitioner asserts also that, upon his information and belief, the prosecutor's closing argument at the sentence phase

> ...consisted of an emotionally wrenching performance replete with biblical references and delivered between sobs with periodic breaks to wipe his teary eyes with a handkerchief.

(petition, p. 11). Because the record on appeal does not contain the sentence argument (R. 924), it cannot be determined whether petitioner's sensational description is in any way accurate. Moreover, even if it could be assumed that the prosecutor's argument at the sentence phase was somehow improper, this would not support petitioner's contention that the determination of guilt was the rest of compromise. The verdict of guilt had been reached before the sentence argument was heard by the jury.[1]

A crucial assumption underlying our criminal justice system is that juries follow the instructions given them by the trial judge. Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983); Parker v. Randolph, 442 U.S. 62, 73 (1979) (plurality opinion). Petitioner cannot maintain that the jury ignored the repeated instructions to find petitioner guilty only if guilt was established beyond a reasonable doubt (R. 840-850, 856, 858, 861, 863, 865 - 866, 868, 870) based only upon assertions unsupported by the record. Accordingly, the Court should deny certiorari.

---

[1] Interestingly, petitioner does not claim that the argument at the guilt stage, which was recorded (R. 759-836), was in any way improper.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL
By-

William D. Little

WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY GENERAL

COUNSEL OF RECORD

ADDRESS OF COUNSEL:

Office of the Attorney General
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11 South Union Street
Montgomery, Alabama 36130

CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of the foregoing brief and argument on the attorney for petitioner by placing said copy in the United States Postal SErvice, first class postage prepaid, and properly addressed as follows:

Hon. David Schoen
Moore Building, Suite 212
217 South Court Street
Montgomery, Alabama 36104

Done this 5th day of July, 1988.

William D. Little

WILLIAM D. LITTLE
COUNSEL FOR RESPONDENT

0294v

SUPREME COURT OF THE UNITED STATES

ANTHONY KEITH JOHNSON *v.* ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 87-7098. Decided October 3, 1988

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting from the denial of certiorari.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I also continue to believe that the death penalty's cruel and unusual nature is made all the more arbitrary and freakish when it is imposed by a judge in the face of a jury determination that the appropriate penalty is life imprisonment. See *Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984) (STEVENS, J., dissenting). Therefore, I would grant the petition for writ of certiorari and vacate petitioner's death sentence for the reasons I expressed in *Jones* v. *Alabama*, 470 U. S. 1062 (1985) (MARSHALL, J., dissenting).

In this case, after a full hearing, the jury determined that life imprisonment, not death, was the punishment which petitioner deserved. Nevertheless, following Alabama law which allows him wide discretion in death sentences, the trial judge overrode the jury's determination and sentenced peti-

tioner to death. I continue to believe that "[i]t approaches the most literal sense of the word 'arbitrary' to put one to death in the face of a contrary jury determination where it is accepted that the jury had indeed responsibly carried out its task." *Jones* v. *Alabama*, 470 U. S., at 1063.